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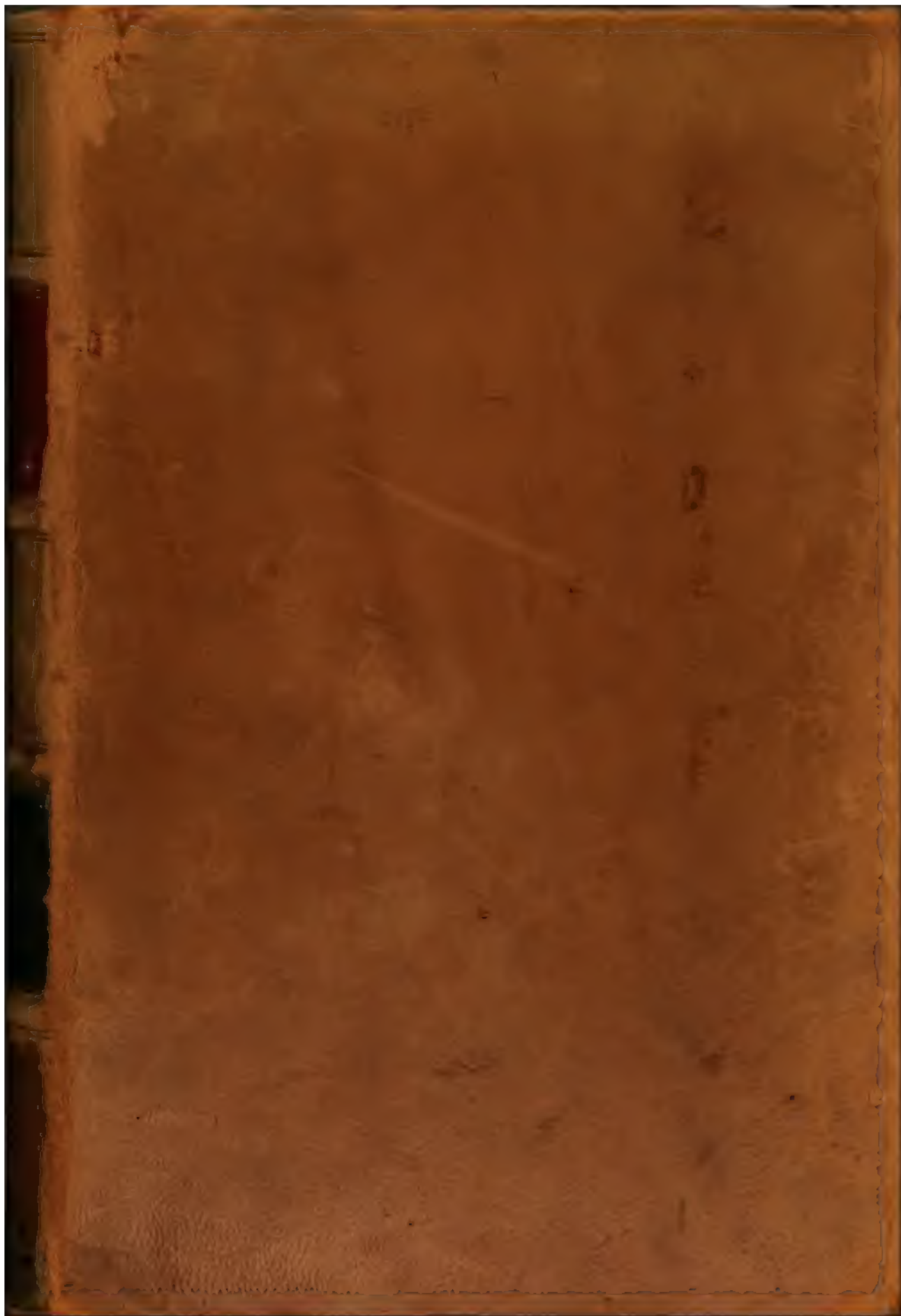
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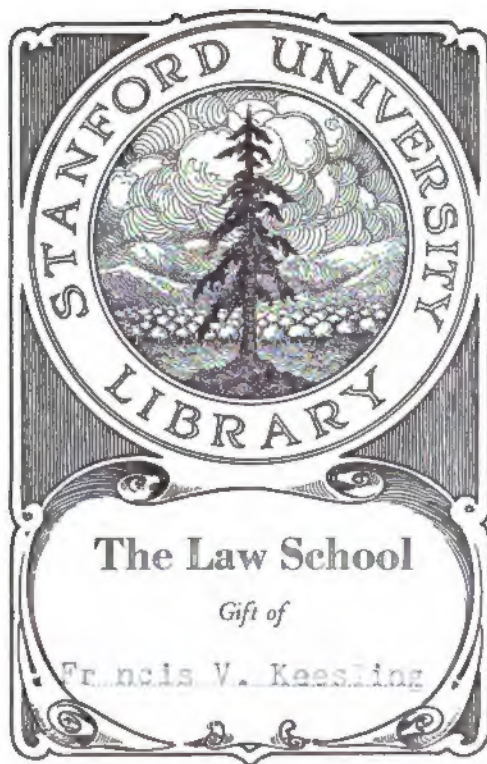
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A
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ELEMENTS

OF THE LAW OF

NEGOTIABLE CONTRACTS

BY

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PREFACE.

The cases here collected and annotated, have been selected by the undersigned, primarily for the use of students in his classes. To make a wise selection of cases from the large number that are to be found upon a particular subject is a most difficult task. The question, which is the most important case upon a given subject, is one upon which opinions will necessarily differ. It has been attempted here to select, as far as possible, the very earliest cases upon the particular subject, so that the student would thereby be able to get at the reason of the rule without reference to any statutory provisions. Attention is called to the latest cases, however, in the foot notes.

Several years of experience as an instructor has taught the undersigned that the best method of impressing a principle upon the mind of the student is to show him a practical application of it. To remember abstract propositions, without knowing their application, is indeed difficult for the average student. But when the primary principle is once associated, in his mind, with particular facts, illustrating its application, it is more easily retained and more rapidly applied to analogous cases.

It is deemed advisable that the student in the law should be required, during his course, to master, in connection with each general branch of the law, a few well-selected cases which are illustrative of the philosophy of that subject. To require each student to do this in the larger law schools has been found to be impracticable, owing to the lack of a sufficient number of copies of individual cases. The only solution of this difficulty seems to be to place in the hands of each student a volume containing the desired cases. In the table of cases will be found many leading cases printed in black type.

E. F. J.

UNIVERSITY OF MICHIGAN,
DEPARTMENT OF LAW,
ANN ARBOR, Oct. 1st, 1898.

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ELEMENTS OF NEGOTIABLE CONTRACTS.

CHAPTER I.

History, Nature and Purposes of Negotiable Contracts.

SECTION 1.

BIOGRAPHY AND ORIGINAL OF BILLS AND NOTES.

GOODWIN *v.* ROBARTS.¹

IN THE EXCHEQUER CHAMBER, JULY 7, 1875.

[Reported in Law Reports 10 Court of Ex. 76, Jan. 28, 1875; also Law Reports 10 Court of Ex. Chamber, 337, July 7, 1875, also in the House of Lords 1 App. Cas. 476, May 12, 13, 18, 19; June 1, 1876.]

COCKBURN, Chief Justice, said: “Bills of exchange are known to be of comparative modern origin, having been first brought into use, so far as it is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century². The use of them gradually found its way into

¹ This case is cited in Wood's Byles on Bills and Notes, 133, 173, 182, 272; Benjamin's Chalmers, Bills, Notes, and Checks, 14, 66, 67, 122; Ames on Bills and Notes, 783; Tiedeman on Commercial Paper, 473; Norton on Bills and Notes, 2, 14, 16; Johnson's Cases on Bills and Notes, 3.

² Chancellor Kent, in his learned commentaries, in speaking of the history of bills of exchange says: “In 1394, the City of Barcelona, by ordinance, regulated the acceptance of bills of exchange; and the use of them is said to have been introduced into Western Europe by the Lombard merchants, in the thirteenth century. Bills of exchange are mentioned in a passage of the Jurist Baldus of the

France, and, still later, and but slowly, into England. We find it stated in a law tract by Mr. Macleod, entitled 'Specimen of a Digest of the Law of Bills of Exchange,' printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the "*Les Mercatoria*," in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. II.,

date of 1328. (Hallam's introduction to the Literature of Europe, Vol. 1, p. 68.) M. Boucher received from M. Legon Deflaix, a native of India, a memoir, showing that bills of exchange were known in India from the most high antiquity. But the ordinance of Barcelona is, perhaps, the earliest authentic document in the middle ages, of the establishment and general currency of bills of exchange. (Consultat de la Mer, par Boucher, tom. i, pp. 614, 620.) The first bank of exchange and deposit in Europe was established at Barcelona in 1401, and it was made to accommodate foreigners as well as citizens. I. Prescott's Ferdinand and Isabella, Int. p. 112, M. Merlin says, that the edict of Louis XI. of 1462, is the earliest French edict on the subject; and he attributes the invention of bills of exchange to the Jews, when they retired from France to Lombardy. The Italians, and merchants of Amsterdam, first established the use of them in France. (Repertoire de jurisprudence, tit. Lettre et billet de Change, sec. 2.) In England, reference was made, in the statute of 5 Rich. II., ch. 2, to the drawing of foreign bills. This was in the year 1381." (See Hallam's Middle Ages, Vol. 4, Pt. 2, ch. 9, p. 255, and note, Am. edit., 1821. See also Cobbet on Pawns, pp. 3, 12.) See also Hallam, Introduct. to Literature of Europe, Vol. 1, ch. 1, § 55, note (a), p. 40 of Paris edition, where he states on the authority of Beekman, that the earliest recorded bills of exchange are in a passage of the Jurist Baldus, and bear the date of 1328. Baldus (as cited in a Dissertation of Mr. Bergson, in the *Revue Etrangere et Franc*, by Foelix, 1843, pp. 203, 204, 206,) gives the forms of bills of exchange drawn in A. D. 1381 and 1385. (Baldus, Consil. edit. Brixensis, Pars. 1, Consil. 53; Id. Pars. 3, Consil. 298. See also the forms in Scaccia de Cambio, § 1, Quest. 5, pp. 110 to 127; Id., pp. 508 to 514; post, § 26, n. 3.)

ch. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant, writing expressly on the law merchant, was unaware of the use of the bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would, of course, increase; yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure*, (1603)¹ in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer.

Negotiability—When First Allowed.—But about this period—that is to say, at the close of the sixteenth or the commencement of the seventeenth century—the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on bills of exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Slavery, cited by Mons. Nougier, in his work, "*De Lettres des Change*," had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seemed to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.²

¹ Cro. Jac., 6 (1603).

² Chitty Bills (8th ed.) 13.

Promissory Notes—When First Used.—In the meantime, promissory notes had also come into use, differing herein from bills of exchange: That they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of *Shelden v. Hentley*,¹ an action was brought on a note under seal by which the defendant promised to pay to *bearer* £100, and it was objected that the note was void because not payable to a specific person. But it was said by the court: “*Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to the bearer of the note, any one that brings the note shall be paid.*” Jones, J., said that “it was the custom of merchants that made that good.”

In *Bromwich v. Loyd*,² the plaintiff declared upon the custom of merchants in London on a note for money payable on demand, and recovered; and Treby, C. J., said that *bills of exchange were originally between foreigners and merchants trading with the English. Afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and therefore the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial.*” To which Powell, J., added: “On indebitatus assumpsit for money received to the use of the plaintiff

¹ 2 Show., 160.

² 2 Lutw., 1582.

the bill may be left to the jury to determine whether it was given for value received." In *Williams v. Williams*,¹ where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error that, the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "*that this custom of merchants was part of the common law, and the court would take notice of it ex-officio; and therefore it was needless to set forth the custom specially in the declaration*, but it was sufficient to say that such a person 'secundum usum et consuetudinem mercatorum,' drew the bill." And the plaintiff had judgment.

Holt's Objection to the Negotiability of Promissory Notes.—Thus far the practice of merchants, traders and others of treating promissory notes, whether payable to bearer or order, on the same footing as bills of exchange, had received the sanction of the courts, but, Holt having become chief justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer; the chief justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments,² contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases persisting in holding them not negotiable by indorsement or delivery.

¹ Carth., 269.

² Lord Holt, C. J., refused to allow the privilege of negotiability to promissory notes. He said in the case of *Buller v. Crips* (6 Mod. Rep. 29), "I remember when actions upon inland bills of exchange did first begin; and they were laid a particular custom between London and Bristol and it was an action against the acceptor. The defendant's counsel would put them to prove the custom, at which Hale, C. J., who tried it, laughed and said 'they had a hopeful case of it.' And in my Lord North's time it was said that the custom in that case was part of the common law of England, and these actions since became frequent, as the trade of the nation did increase, and *all the difference between foreign bills and inland bills is that foreign bills must be protested before a notary*

The Statute of 3 and 4 Anne, c. 9—Its Purpose.— The inconvenience to trade arising therefrom led to the passing of the statute of 3 and 4 Anne, c. 9,¹ whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty. It is obvious from the preamble of the statute, which merely recites that “it had

public before the drawer can be charged, but inland bills need not be protested.” *Lord Holt said of promissory notes that they were a “new sort of specialty, unknown to the common law and invented in Lombard street.”* He continued, “to allow such contract to carry any lien with it were to turn a piece of paper, which is, in law, but evidence of a parole contract, into a specialty.” 5 Mod. Rep. 13; 1 Salk. 24; 2 Salk. 442; Buller v. Crips, 6 Mod. Rep. 30.

¹ Its most important provisions were as follows: “Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that the person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: Therefore, to the extent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted, that all notes in writing whereby any person shall promise to pay *to any other person, his order, or unto bearer*, any sum of money mentioned in the note shall be taken and construed to *be payable to any such person* to whom the same shall be payable; and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are according to the custom of merchants; and that the person to whom such sum of money is payable may maintain an action for the same as he might do upon an inland bill of exchange made, or drawn, according to the custom of merchants; and that any person to whom such note is indorsed, or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain his action for such sum of money either against the person who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange.”

been held that such notes were not within the custom of merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants these notes had been treated as securities negotiable by the customary method of assignment, as much as bills of exchange, properly so-called. The statute of Anne may, indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country as cash, Lord Mansfield and the court of king's bench had no difficulty in holding in *Miller v. Race*,¹ that the property in such a note passes, like that in cash, by delivery, and that a party taking it bona fide, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held, in *Collins v. Martin*,² that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder. Both these decisions, of course, proceeded on the ground that the property in the bank note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made bona fide.

A similar question arose in *Wookey v. Pole*,³ in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favor of blank or order, contained this clause, "if the blank is not filled up, the bill will be paid to bearer." Such an exchequer bill having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants, on a bona fide advance of money. It was held by three judges of

¹ 1 Burrows, 452 (1758).

² 1 Bos. & P., 648 (1797).

³ Barn. & Ald., 1 (1818).

the queen's bench—(Bayley, J., dissentiente)—that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money and other forms of property. "The courts," he says, have considered these instruments either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities show that not only money itself may pass, and the right to it may arise, by currency alone, but, further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (*i. e.*, money) to which such instruments gives the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons, entitled to receive it.

Checks—History of.—Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a "check." Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these, by the decisions of the courts, have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a check on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and the money deposited with a banker is not

only money lent, but the banker is bound to repay it when called for by the draft of the customer. See *Pott v. Clegg*.¹ Besides this, a custom has grown up among bankers themselves of marking checks as good for the purposes of clearance by which they become bound to one another. Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. *It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of Lickbarrow v. Mason*², that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments, which are said to have derived their negotiability from the law merchant, had their origin, and that at no very remote period, in mercantile usage,³ and were adopted into the law by our courts as being

¹ 16 Mees. & W., 321.

² 2 Term. R., 63.

³ It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effects to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in *Brandao v. Barnett*, 12 Clark & F., at p. 805, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize."

The true origin and history of bills of exchange and negoti-

in conformity with the usages of trade; of which, if it were

able instruments like the origin and history of all our law, based upon custom, is enveloped in no small degree of obscurity. The exchange of commodity for commodity or what is known as barter and trade must have existed among all nations from the earliest dawn of the formation of men into communities from their very necessities. During these early days there could be no exchange of goods or trade in commodities except where two persons should meet, each having a certain product which was desired by the other. There was no necessity for purchases, made for the purpose of supplying the future demand. And it was not until the merchants conceived the idea of having a medium of exchange, some product having an intrinsic value, and of great durability, that we had properly what is known as a sale of commodities as distinguished from barter and trade.

It is asserted that commercial contracts were known to antiquity and practiced by the Romans. Chancellor Kent seems to think that they were also known among the Greeks, and cites a passage found in one of the pleadings of Isocrates, showing that bills of exchange were sometimes resorted to at Athens as a safe expedient to shift funds from one country to another.

In an interesting forensic argument which Isocrates puts into the mouth of a son of Sopæus, the Governor of Province of Pontus, in that suit against Passion, an Athenian banker, for the grossest breach of trust, it is said that the son, wishing to receive a large sum of money from his father, applied to Stratocles, who was about to sail from Athens to Pontus, to leave his money and take a draft upon his father for the amount. This, said the orator, was deemed a great advantage, to the young man, for it saved him the risk of remittances from Pontus, over a sea covered with Lacedæmonian pirates; it is added that Stratocles was so cautious as to take security from Passion, for the money advanced upon the bills, and to whom he might have recourse if the Governor of Pontus should not honor the draft, and the young Pontian should fail.

After full investigation, we have great reason to doubt whether the use of bills of exchange or promissory notes for the purposes to which they are now applied was known to antiquity. The nearest approach seems to be a custom which prevailed at Rome, where one paid money to another, to be paid by the other at another place. This contract is frequently referred to in the pandeets, but it may be doubted whether these contracts were those of our modern bills of exchange. They were simply contracts or mandates for the exchange of money in different places.

Certainly the peculiar distinguishing quality of our modern bills of exchange, their negotiable character, does not appear to have been known to the ancients or to have found its way into the general transactions of their commercial intercourse. This at

needed, a further confirmation might be found in the fact that

least is the opinion of many of the modern authors who have discussed these features of these contracts. Pothier, a French author, says: "There is not a single vestige of our contracts to be found in the Roman law." Mr. Bell, an early writer upon this subject, says: "That as a branch of practical jurisprudence, or as a circulating medium in trade, bills of exchange were unknown to the Romans."

Sir William Blackstone in remarking upon the subject of bills of exchange, says that, "This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices, in order the more easily to draw their effects out of France and England into those countries in which they had chosen to reside. But the invention of it was a little earlier, for the Jews were banished out of Guinne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mugul Empire in China." 2 Black. Com. 467.

"Other nations," says Mr. Chitty, "had attributed the invention of these commercial contracts to the Florentines. When being driven out of their country, by the faction of the Gebelings, they established themselves at Lyons and other towns in order to withdraw their effects secretly and to escape the confiscation of them by their enemies." Mr. Chitty further says, "That it seems extremely doubtful at what period, or by whom bills of exchange were first invented."

Each of these various accounts of the origin and history of bills of exchange has been supported by some and rejected by other authors as wholly unsatisfactory and uncertain.

Certain it is, that bills of exchange were used in many of the commercial states bordering on the Mediterranean as early as the 14th century, although it is probable that the forms thereof were different, and had not then settled down into one model or uniform instrument, like that in use in our days. But while similar instruments to our bills of exchange were in quite common use in the 14th century, they were used much earlier. Weber in his work on the history of these customs, published in 1810, states positively that such instruments were in use at Venice in 1171; and a law of Venice in 1272 clearly recognizes these documents. While we find a statute of Marseilles, that once great commercial metropolis of the Mediterranean, dated 1253, which presents evident traces of them, and a transaction of this description is attested by a document of 1256. There has been found several copies of these documents, dated early in the 15th century, which correspond in form almost exactly with the forms in common use to-day. One is still extant, dated April 28th, 1405, drawn by a merchant in Bruges upon a mercantile company in Barcelona.

The introduction and the use of bills of exchange in England

according to the old form of declaring on bills of exchange, the declaration always was founded on the customs of merchants.

SECTION 2.

NATURE AND PURPOSES OF BILLS AND NOTES.

MILLER v RACE.¹

IN THE KING'S BENCH, JANUARY 31, 1758.

[*Reported by I. Burrows, 452.*]

Form of Action.—It was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney or bearer on demand.

The cause came on to be tried before Lord Mansfield, at

seems to have been founded upon a mere practice of merchants and gradually to have acquired the force, at first of a custom, and subsequently of a binding code of rules or laws. Mr. Chitty says, "That the earliest case on the subject to be found in the English reports is that of *Martin v. Boure* (Cro. Jac. 6)."

We have good authority for saying that these instruments were in use in England as early as 1307; for in that year King Edward I. ordered certain money collected there for the Pope, not to be sent to him in coin but by way of exchange.

But whatever may be said about the time of the origin of bills of exchange, it is certainly true that their origin may be assigned to the general necessities and customs of the widely extended business intercourse of the commercial nations which inhabited the shores of the Mediterranean at a very early period in history. In France there is an ordinance of Louis XI. as early as 1462 which permits all persons to give out and remit their money by bills of exchange in the business of merchants in whatever country it may be, except England. It has been said that the law of bills and notes or of commercial contracts has mainly grown up since Lord Mansfield came upon the bench; and we owe more to his labor on this subject than to any other one judicial mind, although vast and valuable productions have been made on the subject by numerous learned justices who have succeeded him.

¹ This case is cited in Chitty on Bills, 196, 216, 241, 258, 260, 523; Story on Bills of Exchange, 62, 188, 207, 416; Tiedeman on Commercial Paper, 1, 289, 464; Wood's Byles on Bills and Notes, 50, 84, 577; Daniel on Negotiable Instruments, 771, 1503, 1672, 1687; Randolph on Commercial Paper, 9, 481, 543; Ames on Bills and Notes, 400; Norton on Bills and Notes, 111, 199.

the sitting in Trinity term last at Guildhall, London, and upon the trial, it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton, in Oxfordshire; that on the same night, the mail was robbed and the bank-note in question (among other notes) taken and carried away by the robber; that this bank-note on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed, that in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, [when payable to bearer] and without any further inquiry or evidence of title, than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th of December, applied to the Bank of England "to stop the payment of this note," which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this, the plaintiff applied to the bank for the payment of this note; and for that purpose delivered the note to the defendant, *who is a clerk in the bank*, but he refused either to pay the note or to re-deliver it to the plaintiff. Upon which this action was brought.

The jury found a verdict for the plaintiff, and the sum of twenty-one pounds ten shillings damages, subject, nevertheless, to the opinion of this court upon this question: "*Whether under the circumstances of the case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action?*"

Argument of Counsel for Defendant.—Sir Richard Lloyd, for the defendant.

The present action is brought not for the money due upon the note, but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present ques-

tion, the note is only an evidence of the moneys being due to him as bearer.

The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now, the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer; though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can or cannot stop payment; that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money; he is the real owner. It is like a medal which might entitle a man to the payment of money, or to any other advantage. And it is by Mr. Finney's authority and request, that Mr. Race detained it.

It may be objected, "that this note is to be considered as cash in the usual course of trade." But still, the course of trade is not at all affected by the present question, about the right of the note. *A different species of action must be brought for the note, from what must be brought against the bank for the money.* And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank for the money. In which action of trover, property cannot be proved in the plaintiff, for a special proprietor can have no right against the true owner.

The cases that may affect the present, are Anonymous,¹ coram Holt, C. J. at nisi prius at Guildhall. There Lord C. J. Holt held, "That the right owner of a bank-note, who lost it, might have trover against a stranger who found it; but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade, which creates a property in the assignee or bearer,"² in which case

¹ 1 Salk., 126.

² 1 Lord Raym., 738, s. c., in which case the note was paid away in the course of trade; but this remains in the man's hands,

the note was paid away in the course of trade; but this remains in the man's hands, and is not come into the course of trade. *Ford v. Hopkins*,¹ per Holt, C. J., at nisi prius at Guildhall. "If bank-notes, exchequer-notes, or million lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them, as to bring an action, into whatsoever hands they are come, money or cash is not to be distinguished; but these notes or bills are distinguishable, and cannot be reckoned as cash; and they have distinct marks and numbers on them." Therefore the true owner may seize these notes wherever he finds them, if not passed away in the course of trade.

H. In Middlesex, coram Pratt, C. J., *Armory v. Delamirie*²—A chimney-sweeper's boy found a jewel. It was ruled "that the finder has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

This note is just like any other piece of property, until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Argument of Counsel for Plaintiff.—Mr. Williams contra for the plaintiff.

The holder of the bank-note, upon a valuable consideration, (and without notice of existing defenses and before maturity) has a right to it, even against the true owner.

1. The circulation of these notes vests a property in the holder, who comes to the possession of them, upon a valuable consideration (and without notice of defenses).

2. This is of vast consequence to trade and commerce, and they would be greatly incommoded if it were otherwise.

3. This falls within the reason of the sale in market-overt, and ought to be determined upon the same principle.

and is not come in the course of trade. In this case the transferee went to the bank and got a new bill in his own name. However, the case turned upon his having the note for a valuable consideration.

¹ H. 12 W., 1 Salk, 283, 284

² 1 Strange 505 (8 Geo. I.)

First. He put several cases where the usage, course, and convenience of trade made the law, and sometimes even against an act of parliament.¹

Secondly. This paper credit has been always, and with great reason, favored and encouraged.²

The usage of these notes is, "that they pass by delivery only (when payable to bearer); and are considered as current cash; and the possession always carries with it the property."

A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney who was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it, for want of title against a true owner; even if there was a chasm in the transfer of it through one only out of 500 hands.

Thirdly. This is to be considered upon the same footing as a sale in market-overt.

³ "A sale in market-overt binds those that had right." But it is objected by Sir Richard, "that there is a substantial difference between a right to the note, and a right to the money." But I say the right to the money will attach to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder of a note, has a right to the note; but after circulation, the holder upon a valuable consideration has a right.

We have a property in this note; and have recovered the value against the with-holder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's Cases, and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or

¹ Stanley v. Ayles, per Hale, C. J. at Guildhall. 3 Keb. 444;
² Strange 1000. Lumley v. Palmer, 1 Salk. 23, where a parol-acceptance of a bill of exchange was holden sufficient against the acceptor.

³ Feny v. Fowler, et al., 2 Strange 946.

³ 1 Salk. 126 is in point.

⁴ 2 Inst. 713.

not in the course of trade: which is all that Ld. C. J. Holt said in 1 Salk. 284.

As in 1 Strange 505, he agreed that the finder has the property against all but the rightful owner, not against him.

Replication of Counsel for Defendant.—Sir Richard Lloyd in reply:

I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner.

This is not only without, but against the consent of the owner.

Supposing this note to be a sort of mercantile cash; yet it has an ear-mark by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford v. Hopkins*.¹

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper; it may be as well stopped, as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade but remains in the hands of the true owner. And therefore, it does not signify in what manner they are passed away, when they are passed away; for this was not passed away. Here, the true owner, or his servant (which is the same thing), detains it. And, surely robbery does not divest the property.

This is not like goods sold in market-overt; nor does it pass in the way of a market-overt; nor is it within the reason of a market-overt. Suppose it was a watch stolen; the owner may seize it (though he finds it in a market-overt), before it is sold there. But there is no market-overt for bank-notes.

I deny the holder's (merely as holder) having a right to the note, against the true owner; and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Ld. Mansfield said, that Sir Richard Lloyd had argued it so ingeniously, that (though he had no doubt about the matter), it might be proper to look into the cases he had cited in order to give a proper answer to them, and therefore the court deferred giving

¹ 1 Salk., 283.

their opinion to this day. But at the same time Ld. Mansfield said he would not wish to have it understood in the city that the court had any doubts about the point.

Decision of Court.—*Lord Mansfield now delivered the resolution of the Court.*

After stating the case at large, he declared, that at the trial he had no sort of doubt, but that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce, which would be much incommoded by a contrary determination.

Negotiable Contracts—Common Law Contracts—Goods—Distinguished.—It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to; viz., to goods, or to securities, or documents for debts.

Now, they are not goods, not securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments as money or cash.

They pass by a will, which bequeaths all the testator's money or cash, and are never considered as securities for money but as money itself. Upon Ld. Ailesbury's ¹will, 900 pounds in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So, on bankruptcies, they cannot be followed as identical and distinguishable from money; but are always considered as money or cash.

'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench;

¹ Papham, et al., v. Bathurst, et al., Ambl. 68, Nov., 1748.

and mistake their meaning. It has been quaintly said, "*that the reason why money cannot be followed is because it has no ear-marks;*" but this is not true. *The true reason is, upon account of the currency of it. It cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed into currency, an action may be brought for the money itself.* There was a case in 1 G, 1, at the sittings, Thomas v. Whip, before Ld. Mansfield, which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Ld. Mansfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true (and it is not at all denied); but not after it had been paid away in currency. And this point has been determined even in the infancy of bank-notes. And Ld. C. J. Holt there says, that it is "by reason of the course of trade, which creates a property in the (assignee or) bearer." (And "the bearer" is a more proper expression than assignee.)

Here an inn-keeper took it, bona fide, in his business from a person who made the appearance of a gentleman. Here is no pretense or suspicion of collusion with the robber; for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing the case had been much otherwise. If it had been a note for 1,000 pounds it might have been suspicious; but it was a small note for twenty-one pounds ten shillings only, and money given in exchange for it.

Another case cited was a loose note¹ ruled by Ld. C. J.

¹ 1 Salk., 126. 10 Williams, 3.

² 1 Ld. Raym., 738.

Holt at Guildhall, in 1698; which proves nothing for the defendant's side of the question, but it is exactly agreeable to what is laid down by my Ld. C. J. Holt in the case I have just mentioned. The action did not lie against the assignee (indorsee) of the bank-note; because he had it for valuable consideration.

In that case he had it from the person who found it, but the action did not lie against him, because he took it in the course of currency; and therefore, it could not be followed in his hands. It never shall be followed into the hands of a person who bona fide took it in the course of currency, and in the way of his business.

The case of *Ford v. Hopkins* was also cited, which was in Hil. 12 W. 3, coram Holt C. J. at nisi prius, at Guildhall and was an action of trover for million lottery tickets. But this must be a very incorrect report of that case; it is impossible that it can be a true representation of what Ld. C. J. Holt said. It represents him as speaking of bank-notes, exchequer-notes and million lottery tickets as like to each other. Now, no two things can be more unlike each other than a lottery ticket and a bank-note. Lottery tickets are identical and specific; specific actions lie for them. They may prove extremely unequal in value; one may be a prize; another a blank. Land is not more specific than lottery tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of property. So far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note into what hands soever it shall come."

Now the whole of that case turns upon the throwing in bank-notes as being like to lottery tickets.

But Ld. C. J. Holt could never say "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost and bona fide paid to him;" even though the action was brought by the true owner, because he had determined otherwise, but two years before, and because bank-notes are not like lottery tickets, but money.

The person who took down this case, certainly misunder-

stood *Ld. C. J. Holt*, or mistook his reasons. For this reasoning would prove (if it were true, as the reporter represents it), that if a man paid to a goldsmith 500 pounds in bank-notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received as cash, and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery (*Walmeley v. Child*, 11th December, 1749) on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable upon her giving bond, with two responsible sureties (as is the custom in such cases), to indemnify him against the bearer, if the notes should be found and ever demanded. The administratrix brought a bill, which was dismissed, because she either could not, or would not, give the security required. No dispute ought to be made with the bearer of a cash-note, in regard to

Fuller, Chief Justice of the Supreme Court of the United States, in the case of *Friedlander et al. v. Texas and Pacific R. R. Co.* (130 U. S., 416), said that "Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential to enable them to perform their peculiar function that he who purchases them should not be bound to look beyond the instrument, that his right to enforce them should not be defeated by anything short of bad faith on his part." It is certainly true that these commercial papers—bills of exchange, promissory notes, checks, etc.—do in a large measure answer the purpose of money in the business world. The character of negotiability which has been given them has enabled them to take the place of the actual use of money, and their use as representatives of money, has made them indispensable in the transactions of the daily business of to-day.

"Bills of exchange were probably the first instruments for the payment of money that were accorded the negotiable quality, though promissory notes, being simpler in form, were doubtless used as evidences of debt before bills of exchange came in vogue amongst merchants. Certainly these two securities were recognized as negotiable instruments before any other paper representatives of money or property passed currently from hand to hand in like manner as money; and from them, as fruitful parents, have sprung

commerce, and for the sake of the credit of these notes; though it may be both reasonable and customary to stay the payment till inquiry can be made, whether the bearer of the note came by it fairly or not.

Lord Mansfield declared that the court were all of the

all the varieties of negotiabilities now known." Dan. on Neg. Inst. Sec. 2.

The existence of these commercial contracts were caused by the necessities of commerce and trade between different nations. So long as all trade was a mere exchange of commodities, neither money nor a representative of money was necessary. It was not long, however, before the necessities of commerce demanded something of real value—of money—for the conveniences of trade. Instead of a simple exchange of one commodity for another it became customary to exchange commodities for something having a representative value which was called money. At first the precious metals were used in bulk as the bases for the measurements of the value of products; later the value of a certain quantity of these metals was fixed by a stamp of the sovereign. This for a long time answered the purposes of commerce. But in the course of time—in the gradual development and extension of commerce between different nations—it was found that the transfer of these precious metals, became not only burdensome and expensive, but there was great danger of losing the same, by robbery and otherwise, in their transfer from one country to another, by the rude methods of transporting them in vogue. The great necessity for something which represented money and which could be thus transferred with less expense and less hazard, was felt and supplied by the ingenious merchants of that day in the form of the various commercial contracts which in one form or another have been adopted and improved from time to time by the commercial world.

It is highly necessary for the purposes and conveniences of commerce that the negotiability of commercial contracts should be established and protected.

Mr. Joseph Chitty in speaking of the general utility of bills of exchange said, "A bill of exchange is a security originally invented amongst merchants in different countries and kingdoms, for the more easy and safe remittance of money, or rather for the purpose of avoiding the necessity of transmitting money itself, from the one to the other, and has since been extended to commercial transactions within the same kingdom." Chitty on Bills, 4.

In the origin of bills of exchange, their *principal utility* was the safe transfer of property from one place to another; but since the great increase of commerce, they have become the *evidence of valuable property*, and in a great measure equivalent to specie, en-

same opinion for the plaintiff; and that Mr. Just. Wilmot concurred.

RULE.—That the postea be delivered to the plaintiff.

larging the capital stock of wealth in circulation, and thereby facilitating and increasing the trade and commerce of the country. *Gibson v. Minet*, 1 Hen. Bla., 618.

Sir William Blackstone in speaking of the purposes of these instruments puts the following instance: “If A. live in Jamaica, and owe B., who lives in England, 1000£, now if C. be going from England to Jamaica, he may advance B. this 1000£, and take a bill of exchange, drawn by B. in England upon A. in Jamaica, and receive it when he comes thither: Thus B. receives his debt at any distance of place by transferring it to C., who carries over his money in paper credit, without the risk of robbery or loss.” 2 Bla. Comm., 466, 467.

CHAPTER II.

Bibliography of Negotiable Contracts.

SECTION 3.

TEXT BOOKS AND CASES.

The subject of negotiable contracts has been discussed by many text writers. Among them may be mentioned the following:—

- Ames on Bills and Notes;
- Bayley on Bills;
- Bateman on Commercial Paper (1860);
- Beauves, *Lex. Merc.*—Bills of Exchange (1720);
- Benjamin's Chalmers on Bills, Notes and Checks;
- Bigelow on Bills and Notes;
- Bigelow's Cases on Bills and Notes;
- Bryant and Stratton's Commercial Paper;
- Byles on Bills and Notes;
- Chalmers on Bills, Notes and Checks;
- Chitty on Bills of Exchange;
- Cunningham on Bills of Exchange;
- Daniel on Negotiable Instruments (2 vol.);
- Edwards on Bills and Promissory Notes (1857);
- Hartman on Bills of Exchange;
- Hough's Article in Vol. 2, American and English Encyclopedia of Law;
- Huffcut's Negotiable Instruments (1898);
- Hulteau on Bills;
- Johnson on Bills and Notes (1898);
- Johnson's Cases on Bills and Notes;
- Kyd on Bills;
- Malynes *Lex. Mercatoria* (1622);
- Marius on Bills and Notes (1670);
- Norton on Bills and Notes;
- Paige's Cases on Commercial Paper;

Parsons on Bills and Notes (1870);
Pomeroy's Smith's Mercantile Law;
Pothier de Exchange;
Randolph on Commercial Paper (3 vol.);
Scrutten's Elements of Mercantile Law (1891);
Sharswood's Bayley on Bills;
Smith's Mercantile Law;
Story on Promissory Notes;
Story on Bills of Exchange (1843);
Tiedeman on Commercial Paper;
Wood's Byles on Bills and Notes.

SECTION 4.

Among the books which are most useful to the practitioner, engaged in the active practice of the law may be mentioned Daniel on Negotiable Instruments in 2 vols. (4th ed.) (1891); Randolph on Commercial Paper in 3 vols. (1st ed.) (1888); Tiedeman on Commercial Paper (1st ed.) (1889); Ames on Bills and Notes in 2 vols. (1881) (discussion of leading cases). These authors have each discussed the fundamental principles of the law of commercial contracts and have cited numerous illustrations, thereby rendering their texts valuable to the practitioner.

SECTION 5.

Among the texts which are valuable for class room purposes may be mentioned Chalmers (Benjamin's ed.); Byles on Bills and Notes (Wood's 8th ed.); Norton on Bills and Notes (2nd ed.); Bigelow on Bills and Notes (1st ed.); and Ames on Bills and Notes; Tiedeman on Commercial Paper and Huffcut on Negotiable Instruments (1898).

CHAPTER III.

Enumeration and Definition of Negotiable Contracts.

SECTION 6.

NEGOTIABLE CONTRACTS—ENUMERATED.

The following instruments have been generally held to be negotiable: Bills of exchange, Promissory Notes, Checks, Certificates of Deposit, Bank Bills, Bank-notes, United States Treasury Notes, Exchequer Bills, Government Bonds, Receipts for Bonds to be issued, Bonds of Private Corporations, Coupon Bonds, Coupons, Gold Certificates, and Silver Certificates.

SECTION 7.

QUASI-NEGOTIABLE CONTRACTS—ENUMERATED.

The following contracts may be considered Quasi-negotiable contracts: Bills of Lading, Warehouse Receipts, Due Bills, Letters of Credit, Bank Pass Books, and Receiver's Certificates.

SECTION 8.

BILL OF EXCHANGE—DEFINED.¹

By an Act of Parliament in 1882, known as the "English Bills of Exchange Act," a bill of exchange was defined to be "An unconditional order in writing, addressed by one person

¹Many definitions have been given for bills of exchange. Blackstone defined a bill of exchange to be "An open letter of request from one man to another, designating him to pay a sum named therein to a third person on his account." 2 Com., 466.

Chitty says "It is defined to be an open letter of request from, and order by one person on another to pay a sum of money therein mentioned to a third person on his account." Chitty on Bills, 1.

Parsons on Bills says, "A written order for the payment of money." 1 Parsons on Bills and Notes, 52.

Judge Byles defines a bill to be "An unconditional written

to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer."

A bill of exchange is *an unconditional written¹ order by one*

order from A to B directing B to pay C a sum certain of money named therein." Byles on Bills and Notes, 1.

Judge Kent defines a bill to be "A written order or request by one person to another for the payment of money at a specified time absolutely and at all events." 3 Kent Com., 74.

¹Must be Written.—Chitty says, "A bill of exchange being an *open letter* of request by one person to another to pay money, it follows that it must be in writing." Chitty on Bills, 126.

Story on bills of exchange says, "It must be in writing and should be signed by the drawer, or by some person duly authorized in his name and on his behalf." Story on Bills, 33.

Concerning this requisite of a bill of exchange, there certainly can be no controversy; an unwritten note would be a contradiction in terms. This requisite applies to all negotiable instruments. A verbal or oral promise, however valid and binding in law, can never be considered a *negotiable* contract. This proposition is obvious upon the slightest consideration.

May be Written in Pencil or Ink.—In the case of *Geary v. Physic*, 5 B. & C., 234 (11 E. C. L., 442), (1826), the plaintiff brought an action of assumpsit as endorsee against the defendant as maker of a promissory note for the sum of thirty pounds payable two months after, to the order of one Folder, and indorsed by him, (Folder), to one Kemo, who subsequently endorsed the note to the plaintiff. At the trial before Abbott C. J., at the London sittings, after Hilary term, 1825, it appeared that the indorsement by Kemp, to the plaintiff was in pencil, and it was thereupon objected that the plaintiff could not recover; an indorsement in pencil not being such an indorsement as the law and custom of merchants recognizes to be sufficient to pass the interest in a bill of exchange, and promissory notes being by the statute 3 and 4 Ann, c. 9 s. 1, assignable or indorsable in the same manner as unpaid bills of exchange are according to the custom of merchants. The Ld. Chief Justice thought it sufficient, and directed the jury to find a verdict for the plaintiff, reserving liberty to the defendant's counsel to move to enter a non-suit, if the court should be of opinion that the indorsement of the promissory note in pencil, was not a good and valid indorsement. F. Pollock, in last Easter term, obtained a rule nisi to enter a non-suit. He contended, *first*, that a writing in pencil, was not a writing recognized at common law; and he cited Co. Litt., 229 a, where Ld. Coke, speaking of a deed, said, "Here it is to be

person upon another to pay to some third person or his order

understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or on the bark of a tree, or on a stone, or the like, etc., and the same be sealed or delivered, yet is it no deed, for a deed must be written either in parchment or paper, as before is said; for the writing upon these is least subject to alteration or corruption." For the same reasons a writing ought to be made with materials least subject to alteration or corruption. Now, writing made with a pencil is easily altered or obliterated, and therefore, for the reasons given by *Ld. Coke*, where the law requires a contract to be in writing, it ought to be made with materials the least subject to alteration. *Secondly*, he contended, that it was not a writing according to the custom and usage of merchants. In point of practice bills of exchange were generally written in ink and it lay upon the plaintiff in this case to show by evidence that this was a writing according to the custom of merchants.

Thesiger now showed cause. *First*. The passage cited from *Co. Litt.*, 229, a., regards only the *materials upon which, not with which*, a deed must be written; and even assuming that a deed written in pencil might not be good, it does not, therefore, follow that a bill of exchange so written may not be so. Deeds are more solemn instruments, are intended permanently to go along with the inheritance, but bills of exchange are made to continue in force for a very short period. *Letters and words traced on paper by a pencil, constitute a writing in the ordinary acceptation of that term.* In *Jeffry v. Walton*, 1 Stark, 267, a memorandum entered in pencil upon a card was received as evidence of an agreement; and in *Rymes v. Clarkson*, 1 Phil., 22. Sir John Nicholl was of opinion that a will written by a testator with a pencil would be valid, provided that the court could be satisfied that he intended so to execute his will. In *Green v. Skipworth*, 1 Phil., 53, a disposition made by a testator in pencil was carried into effect, and in *Dickenson v. Dikenson*, 2 Phil., 173, alterations in pencil in a regularly executed will were admitted to probate. Sir John Nicholl said, "There was no doubt that in point of law they must be considered as equally valid as if made in ink, provided the deceased intended them to take effect." Now, there can be no question as to the intention here. For here Kemp, not only wrote his name on the note in pencil, but he passed it from his hand to another, thereby clearly showing that he intended to transfer the property in the note. The authorities, therefore, show that this indorsement in pencil is an indorsement in writing within the legal meaning of that term.

Secondly. It is an indorsement in writing within the legal meaning of that term. It is an indorsement in writing within the usage and custom of merchants. That usage requires that the indorsement should be in writing; it refers to the act to be done, and

or bearer, a certain sum of money therein named. These

not to the particular mode or the materials with which it is to be done. The argument addressed to the court on the part of the defendant goes to confound the usage with the practice. If the usage requires not only that the indorsement should be in writing, but that it should be written in a particular mode, it will be a matter of inquiry whether the color of the ink, or the species of paper on which the bill is written, be such as is required by the custom.

F. Pollock, contra. The passage from Co. Litt. was cited to show that where the law required a contract to be in writing, it required that it should be written on materials which were the least subject to alteration; and from thence it was inferred that the law, for the same reason, would require that it should be written with materials having the same quality, general convenience certainly requiring that negotiable instruments should be written with materials more durable than pencil. It lay upon the plaintiff to show that such a writing was a writing within the custom of merchants, and that he has not done. Suppose the indorsement upon the paper had been scratched with a pen, or with the inverted end of a pencil, would that have been a writing according to the custom of merchants?

Abbott, C. J. *There is no authority for saying that where the law requires a contract to be in writing, that writing must be in ink.* The passage cited from Ld. Coke, shows that a deed must be written on paper or parchment, but it does not show that it must be written in ink. *That being so, I am of opinion that an indorsement on a bill of exchange may be by a writing in pencil.* There is not any danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent it being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an indorsement of bills of exchange should be in writing, without specifying the manner with which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff.

Bailey, J. *I think that a writing in pencil is a writing within the meaning of that term at common law and that it is a writing within the custom of merchants. I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil.* If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the

instruments have been defined in some jurisdictions by statute.

character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that the writing should be made with any specific material.

Holroyd, J., concurred.

RULE.—Discharged.

A note in pencil is valid while it is legible. Neither will it amount to a material alteration of a negotiable contract to trace the writing in pencil with ink. *Reed v. Roark*, 14 Tex., 329 (1855); *Chitty on Bills*, 126, 127, 184, n.

Form Required.—Judge Bailey in the case of *Green v. Davies* said “That no particular form of words is necessary to constitute a negotiable contract.” 4 B. & C., 235. (10 E. C. L., 557.)

The following have been held sufficient as to form:

\$1000.00. ANN ARBOR, MICH., May 8, 1898.

Six months after date of this first of exchange (second and third unpaid) pay to the order of E. F. one thousand dollars, value received.

CHARLES E. HISCOCK.

TO ROTHSCHILD BROS.,
London, Eng.

\$1000.00. ANN ARBOR, MICH., May 8, 1898.

Ten days after sight, pay to Mr. A., or order, one thousand dollars, value received.

CHARLES E. HISCOCK.

TO MR. JOHN WANAMAKER,
Philadelphia, Pa.

Must Not be Under Seal.—The definition of a negotiable contract is that it is “an open letter,” for the payment of money. By the phrase “open letter” is meant that it must not be under seal. “If a seal be affixed to a paper, in the ordinary form of a note, its character as such is destroyed; and this rule applies to corporations as well as individuals.” *Daniel on Negotiable Instruments*, § 32; *Rawson v. Davison*, 49 Mich., 607; *Clark v. Farmer’s Manuf. Co.*, 15 Wend., 256; *Weeks v. Esler*, 143 N. Y., 374; *Brown v. Jordhal*, 32 Minn., 135; *Osborn v. Kistler*, 35 Ohio st., 99; *Osborne v. Hubbard*, 20 Oregon, 318; *Muse v. Dantzler*, 85 Ala., 359; *Mason v. Frick*, 105 Pa. st., 162.

In *Anderson v. Bullock*, 4 Munf., 442, the following was held to be a promissory note, and the scroll annexed as a seal to be mere surplusage:

\$2,361.81. RICHMOND, October 10, 1801.

“On or before the first day of February next, we bind ourselves, our heirs, executors, or administrators, to pay Thomas and

For a collection of the various definitions of promissory notes,

Amos Ladd, or order, two thousand, three hundred and sixty-one dollars and eighty-one cents.

“AUSTIN & ANDERSON, (L. S.)”

14 Cent., L. J., 317; Story on Bills, § 62; Helper v. Alden, 3 Minn., 332; Tiedeman on Commercial Paper, § 32.

In many jurisdictions the quality of negotiability has been conferred upon sealed commercial instruments. (See statutes of your state). This has been done in the following states: Ohio, Massachusetts, Colorado, Dakota, Florida, Georgia, Illinois, Kansas, Tennessee, Nebraska, and North Carolina.

Kinds of Bills.—Bills of exchange are either foreign or inland. They are said to be foreign when they are drawn in one country and made payable in another. If a bill is drawn in one of the states of the Union and is payable in another it is a foreign bill. The states of the Union are in this respect foreign to each other. An inland bill of exchange is one which is both drawn and made payable in the same country. A bill is not necessarily foreign because the parties to it reside in different countries. Neither is it an inland bill because the parties to it reside in the same state or country, for, if the bill actually be drawn in one state by parties of the state and made payable to parties within the state, but payable in another state or county, it is a foreign bill. There is no necessary difference in the form between inland and foreign bills; but there are certain rules controlling foreign bills which do not apply to inland bills. For instance, a foreign bill must be protested while inland bills need not be. *Ld. Holt* in the case of *Boroughs v. Perkins* (*Holt's Rep.*, 121, Trinity term, 2 Ann.), said: “In inland as well as foreign bills of exchange, the person to whom it is payable must give convenient notice of non-payment to the drawer; for if by his delay, the drawer receives prejudice, the plaintiff shall not recover. A protest on a foreign bill was part of its constitution; and on inland bills, a protest is necessary by this statute, but was not at common law. Yet the statute doth not take away the plaintiff's action for want of a protest, nor does it make it a bar thereto; but this statute seems to take place only in case there be no protest to deprive the plaintiff of damages or interest, and to give the drawer a remedy against him for damages, if a protest be not made.”

Foreign bills are usually drawn in sets or copies, usually three and sometimes more; and these sets or copies are called in law a “*set of exchange*” and constitutes but one bill.

Parties to Bills of Exchange—Enumerated and Defined.—The parties to a bill of exchange are denominated as the *drawer*, the *drawee*, *payee*, *acceptor*, *holders*, *indorsees*, and *transferees*. The person who makes or draws the bill is the drawer; the person upon whom it is drawn and who is expected to accept and pay the

bills of exchange and other negotiable contracts the student is referred to Randolph on Commercial Paper.

SECTION 9.

PROMISSORY NOTES DEFINED.¹

A promissory note is an unconditional written promise by one person to pay to another or to his order, or bearer, a certain sum of money therein named.

A promissory note is defined by the English bills of exchange Act Sec. 83 to be "An unconditional promise in

same is the drawee; the person in whose favor it is drawn is the payee. Subsequent parties may be denominated as holders, indorsers, indorsees, or transferees, according to the nature of the transaction, and their particular liability will be discussed under the head of Transfer by Indorsement. When the drawee accepts the bill he is called the acceptor.

¹ **Other Definitions.**—Blackstone defines a promissory note to be "A plain and direct engagement in writing to pay a sum specified at a time therein limited, to a person therein named, or sometimes to his order or often to the bearer at large." 2 Com., 467.

Judge Kent adopts Bailey's definition, which is, "A written promise by one person to another for the payment of money absolutely, at a specified time, and at all events." 3 Kent. Com., 74.

Judge Byles says, that a promissory note is, "An absolute promise in writing, signed but not sealed, to pay a certain specified sum at a time therein limited or on demand or at sight, to a person therein named or designated, or to his order, or to the bearer." Byles on Bills and Notes, 5.

Judge Story said. "It is a written engagement by one person to pay another person therein named absolutely and unconditionally a certain sum of money at a time specified therein." Story on Bills and Notes, § 1.

In California, the statute defines a promissory note to be, "An instrument negotiable in form whereby the signer promises to pay a specified sum of money." Cal. Civ. Code, § 3244.

Must be in Writing.—A promissory note like a bill of exchange cannot exist in parol. It must be reduced to writing; but must not be under seal unless permitted by a statutory provision in the particular jurisdiction. It may be written upon parchment or paper and with pen or pencil. See cases cited in the note to § 8 upon this question.

Form Required.—No particular phraseology or form is required for promissory notes, so long as they contain all the

writing made by one person to another, signed by the maker, engaging to pay, on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer."

SECTION 10.

OTHER NEGOTIABLE AND QUASI-NEGOTIABLE CONTRACTS.

The negotiable as well as the quasi-negotiable contracts enumerated in Sections 1 and 2 of this chapter, and not defined in this chapter, will be defined and discussed in chapters devoted to those particular subjects.

essential elements of a negotiable contract. They may be written or printed. The following have been held to be sufficient in form:

\$500.00.

ANN ARBOR, MICH., May 8, 1898.

One year after date I promise to pay to E. F. or order, five hundred dollars at the Ann Arbor Savings Bank of Ann Arbor, for value received, with interest.

CHARLES E. HISCOCK.

\$500.00.

ANN ARBOR, MICH., May 6, 1898.

On demand, we promise to pay to the order of E. F., five hundred dollars, value received, with interest after maturity.

CHARLES E. HISCOCK,
JOHN R. MINER.

\$100.00.

ANN ARBOR, MICH., May 8, 1898.

Thirty days after date we, or either of us, promise to pay the bearer one hundred dollars.

CHARLES E. HISCOCK,
JOHN R. MINER.

The first of these examples is known as a several note; the second as a joint note, and the third as a joint and several note.

Parties to a Promissory Note—Enumerated and Defined.—The parties to a promissory note are designated as *maker*, *payee*, *indorsee*, *holders*, *indorsers*, *transferers* and *transferees*. The first two parties might be called original parties and the others subsequent parties. The one who gives the note and who is primarily liable thereon is called the maker. The person to whom the note is to be paid in the first instance is called the payee. Whether a party is an indorser, indorsee, transferer, or transferee, depends altogether upon the nature of his contract, which relations will be discussed under the head of "Transfer by Indorsement."

CHAPTER IV.
Essentials of Negotiable Contracts.

SECTION 11.

ESSENTIALS—GENERALLY.

1. A bill of exchange must contain an order.
 2. A promissory note must contain a promise.
 3. The order and the promise must be absolute and unconditional.
 4. The order and the promise must be for the payment of money.
 5. The order and the promise must be for the payment of a certain sum of money.
 6. The order and the promise must be to pay at some time certain.
 7. They must be in writing.
 8. They must be signed by the parties giving them.
 9. The parties must be definite and certain.
 10. The contract must be delivered.
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SECTION 12.

A BILL OF EXCHANGE MUST CONTAIN AN ORDER BY ONE PERSON TO ANOTHER.

RUFF *v* WEBB.¹

IN THE KING'S BENCH; EASTER TERM, 34 GEORGE III., MAY 24, 1794.

[*Reported in 1 Espinasse 127; star p. 129.*]

Form of Action.—*Assumpsit* for work and labor, with the common counts. Plea of the general issue.

¹This case is cited in Daniel on Neg. Inst., 35; Tiedeman on Com. Paper, 23; Benjamin's Chalmers, Bills, Notes and Checks 10, 56; Norton on B. & N., 29; Randolph on Commercial Paper, 105; Story on Bills of Ex., 33; Chitty on Bills, 118, 128, 129, 130, 154; Wood's Byles on B. & N., 31, 147.

The action was brought to recover the amount of wages due by the defendant to the plaintiff.

The plaintiff had been servant to the defendant, and on his discharging him from his service, had given him a draft for the amount of his wages on an unstamped slip of paper, in the following words:

“Mr. Nelson *will much oblige* Mr. Webb, by paying J. Ruff, or order, twenty guineas on his account.”

This draft the plaintiff had taken, but it did not appear

What Will Constitute an Order.—Every bill of exchange must contain an imperative order or a direction to pay; *but this order may be expressed in polite, civil language. Any form of words implying a right on the part of the drawer of the bill to demand payment will be sufficient.* No particular word or words are essential to constitute the order or direction; *the word or words used, however, must be in the nature of a demand or a right, and not the mere asking of a favor.* The following expressions have been held to be a sufficient order or direction: “*Please pay, John Jones*”; “*Please let the bearer have \$50.00; I will arrange it with you this forenoon.*”

In the case of *Rex v. Ellor*, 1 Leech 323, the following instrument:

“Messrs Songer,—Please send 10 pounds by the bearer, as I am so ill I cannot wait upon you. ELIZABETH WERY.”

was held not to contain an order. The court said, “This appears to be a mere letter, rather requesting the loan of money than ordering the payment of it. The terms of it do not import anything compulsory on the part of the drawee to pay it; and, in the case of *Mary Mitchell*, it was determined, by nine judges against one, that the order was not within the meaning of the act; because the direction of it was not positive, and the terms of it did not import that the party giving it had a right to the goods ordered.”

In *Russell v. Powell*, 14 M. & W., 418, the following instrument:

“TO THE EXECUTORS OF T. H., DECEASED:

We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of 250 pounds, being the amount directed by the order of the 29th of July last, to be paid to our order.

We are, Gentlemen,

Your very obedient servants,

JOHN MYNN.”

was held not to contain an order to pay but a mere warrant for the payment of money. A similar ruling is found in the cases of *Hamilton v. Spottiswoode*, 4 Exch., 200; *Willoughby's Case* 1 Leech, 95.

In the case of *Hoyt v. Lynch*, 2 Sandf., 328, the following

that he had ever demanded payment of it from Mr. Nelson, to whom it was addressed.

It was given in evidence on the part of the defendant, that he lived in the country, and kept cash with Mr. Nelson in London, and that he paid all his bills in that manner, by drafts on Nelson; that the plaintiff knew that circumstance and took the draft without any objection; and that if he had applied to Nelson, it would have been paid. This evidence was relied on as a discharge, and bar to the action.

statement attached to an ordinary statement of account was held to be a good bill of exchange:

“WILLIAMSBURGH, Dec. 16, 1847.

“Mr. J. Lynch,—Please pay the above bill—being the amount for tinning your house on South Sixth Street—and charge the same to our account; and much oblige,

Yours,

SMITH & WOGLOM.”

In the case of *Wheatley v. Strobe*, 12 Cal., 92, upon the following instrument:

“SAC CITY, July 18, 1857.

“Mr. Strobe: Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account.

E. D. WHEATLEY.”

Justice Field, now of the Supreme Court of the U. S., said: “No further particulars than these are essential to constitute a bill of exchange. The insertion of the word ‘please’ does not alter the character of the instrument. This is the usual term of civility and does not necessarily imply that a favor is asked.”

In *Woolley v. Sergeant*, 8 N. J. L., 323, the following instrument: “Mr. David Sergeant, please to *credit* John Woolley, or bearer, thirty dollars, and I will pay you by the tenth day of April next, and you will oblige your friend,

JOHN MILLER ”

was held not to be a good bill of exchange. Ford J. said: “The instrument is neither a bill of exchange nor a promissory note, for it does not require payment; *but only the giving of credit* on a book account.”

In *Spurgin v. McPheeters*, 42 Ind., 527, the following instrument was held to possess all the characteristics of a bill of exchange:

“Mr. B.—

Sir, Please pay to A. or order the sum of one hundred and nineteen dollars on said bill of 1¼-in. lumber, and oblige the firm of

C. & Co.

B.”

In the case of *Little v. Slackford*, 1 Mood. & Malk., 171, Ld. Tenderton held the following not to be a bill of exchange:

Argument of Counsel for Plaintiff.—Shepherd for the plaintiff contended, that the only mode by which this could operate as a bar to the action, was by taking the draft in question as a bill of exchange; in which case, under Stat. 3 and 4 Ann. c. 9, 7, it is declared that if any person

“MR. LITTLE:—Please to let the bearer have seven pounds and place it to my account, and you will oblige,

Your humble servant,

J. SLACKFORD.”

An instrument in writing by which A. directs B. to pay C. or bearer \$400, and take up A.'s note of that amount, is not a bill of exchange. *Cook v. Satterlee*, 6 Cow., 108. *Chitty on Bills*, 159.

Language of civility merely ought not to be permitted to change the nature and character of these instruments; but the language used must necessarily import the asking of a favor coupled with the right to demand a compliance therewith. To illustrate the words of civility, “Please to pay” in an order by a man on his banker, who had money of the drawer in his hands, can certainly be construed to be an order to pay absolutely. Whatever language used, in order to be a good order to pay money, it must amount to an absolute, unconditional *order* to pay. If the payment is made to depend upon any *contingency* whatever, the instrument will not be a negotiable contract. The following are not good bills of exchange: “Please pay when you collect, etc.” “Pay when a certain ship arrives, etc.”; “Pay when a railroad is constructed to a certain point”; “Pay on the return of this note”; “Pay out of the rents and profits received from my farm”; “Pay out of the growing crops”.

See following cases: *Coolidge v. Ruggles*, 15 Mass., 387; *Palmer v. Pratt*, 2 Bing., 185; *Blackman v. Lehman*, 63 Ala., 547; *Morice v. Lee*, 8 Mod. Rep., 363; *Mason v. Metcalf*, 8 Baxt., 440; *Roberts v. Peake*, 1 Burr., 323; *Powell v. Grey*, 6 Grey, 340; *Gillilan v. Myers*, 31 Ill., 525; *Crawford v. Cully*, *Wright* (Ohio), 453; *Kinney v. Lee*, 10 Texas, 155; *Averett v. Booker*, 15 Gratt (Va.), 163; *DeForest v. Frary*, 6 Cow., 151.

The general rule is that the payment must be *ordered*, but under certain circumstances a *request* may amount to an order. *Morris v. Lea*, *Ld. Raym.*, 1397; *Brown v. Harraden*, 4 T. R., 149; *Ruff v. Webb*, *supra*. But the order or request to pay must be a matter of right and not of favor. *Little v. Slackford*, 1 Mood. & Malk., 171. The word “Pay” is not absolutely indispensable, for the word “Deliver” will be sufficient. *Morris v. Lea*, *supra*.

No stereotyped form of words is necessary to constitute a note or bill; and, if it be doubtful for which of the two a particular instrument was intended, it may be treated as either. *Block v. Bell*, 1 M. & Rob., 149; *Edis v. Bury*, 6 B. & C., 433.

shall accept a bill of exchange, in satisfaction of a debt, the same shall be deemed a full and sufficient discharge, if the person so accepting such bill for his debt shall not take his due course by endeavoring to get the same accepted and paid, and making his protest for non-acceptance

But a note must in legal effect, contain a promise; and a bill, an order for the payment of money. The simple *acknowledgement* of a debt, such as, "I. O. U." is not a promissory note; nor does an entreaty addressed to a drawee to pay a certain sum amount to a bill of exchange. This rule is now changed by statute in some of the states.

The theory is, in the case of a bill, that the drawer has funds deposited with the drawee which he may demand as a matter of right and not as favor. Hence, if it appears from the tenor of the instrument that the drawer has no right to order the money paid, it is no bill of exchange. Norton on Bills and Notes, 29.

But mere language of courtesy will not deprive the instrument of its commercial character. Judge story says: "The language is not to be too closely scanned; nor is it, because it has politeness now generally introduced into commercial contracts and transactions, to be presumed to ask a favor, and not demand a right. The true rule would seem therefore, to be, to hold the mere drawing of a bill to be the demand of a right and not the asking of a favor, in all cases, where the language is susceptible of two interpretations; and to deem it favor only, when the language used repeals, in an unequivocal manner, the notion, that it is claimed as a right." Story on Bills, 45.

In *Bissenthall v. Williams*, 1 Duval, 329, a Kentucky court held the following instrument to be sufficient to constitute a bill of exchange: "Please let the bearer have \$50.00; I will arrange it with you this afternoon," and signed, "Yours, most obedient."

At the trial the plaintiff in the case insisted that the instrument was not a bill of exchange, but a covenant, and was barred only by the lapse of fifteen years. As a basis for his contention, he relied upon the concluding words: "I will arrange it with you this afternoon," as well as upon the general tone of courtesy and supplication which pervaded the instrument. He further contended that an intention to make the instrument a bill would have been manifested by employing some usual phrase to that effect, such as, "And place to my account." But the court overruled the contention and sustained the instrument as a bill on the principle stated by Bouvier that: "It is usual, when the drawer of a bill is debtor to the drawee, to insert in the bill these words: 'and put it to my account'; but where the drawee is debtor to the drawer, then he inserts these words: 'and put it to your account'; but it is altogether unnecessary to insert any of these words."

or non-payment; but he contended, that in point of substance it was not a bill of exchange, but a mere request to pay money, not accepted by Nelson, or such as could put the plaintiff into any better situation with respect to his demand. But if it was taken as a bill of exchange, then it could not be given as evidence at all, as it was not stamped.

Argument of Counsel for Defendant.—It was answered by the defendant's counsel, that the plaintiff's having accepted the draft as payment, was a waiver of every objection to it, and that he was therefore bound by it, and could not recur to the demand for wages.

Decision of Court.—Lord Kenyon said he was of opinion that the paper offered in evidence was a bill of exchange; that it was an order by one person to another to pay money to the plaintiff or his order, which was in point of form a bill of exchange; that as such it could not be given in evidence, without being legally stamped; and as the only mode in which it could operate as a discharge of the plaintiff's demand was, as stated by the plaintiff's counsel, that the plaintiff in point of law was therefore entitled to recover.

SECTION 13.

A PROMISSORY NOTE MUST CONTAIN AN EXPRESS PROMISE TO PAY.

CURRIER v. LOCKWOOD.¹

IN THE SUPREME COURT, CONNECTICUT, OCTOBER, 1873.

[*Reported in 40 Connecticut, 349.*]

Form of Action.—An action in assumpsit upon a written instrument described as a note, with the common counts; brought originally before a justice of the peace and appealed to the Court of Common Pleas of Fairfield county, and tried in that court, upon the *general issue*, closed to the court,

¹ This case is cited in Wood's Byles on B. & N., 45; Daniel on Negotiable Instruments, 36, 39, 899; Randolph on Commercial Paper, 106; Norton on Bills and Notes, 32, 34; Bigelow on B. & N., 11; Benjamin's Chalmers' Bills, Notes and Checks, 278; Ames on Bills and Notes, 21; Tiedeman on Commercial Paper, 23.

Claim of Plaintiffs in Court Below.—The plaintiffs claimed, *first*, as a matter of law, that the writing was a promissory note, not negotiable under the statute, and was not barred until seventeen years from its date; also, *second*, that the facts proved an acknowledgment of the debt, and a new promise, which took it out of the statute of limitations.

Claim of Defendant in Court Below.—The defendant claimed adversely to each of these claims.

Holding of the Court Below.—The court ruled adversely to the claims of the plaintiffs, and held that the debt was barred by the statute of limitations, and rendered judgment for the defendant to recover his costs.

Claim of Plaintiffs in Supreme Court.—The plaintiffs moved for a new trial,

Thompson in support of the motion, contended.

First. That there is no variance. The writing imports a “promise to pay” and it is set forth according to its legal effect.¹ The acknowledgment of indebtedness implies a promise to pay, and constitutes it a promissory note.² If the instrument is a “note not negotiable,” it is not barred by the statute of limitations, such notes running seventeen years.

Secondly. But if within the statutes which limits it to six years, yet it is taken out of the statutes by the acknowledgments of the debt made by the defendant within six years of the bringing of the suit. He admitted that it was justly due when he said, “I will give you a ton of coal for it.” He afterwards went to settle it, asked for the note, and not until directed to settle with the agent did he say that it was outlawed, and even in declaring it to be outlawed he does not say that he shall refuse to pay it on that account.³

¹ Smith v. Allen, 5 Day (Conn.), 337, where the note read as follows: “Due A. B. one hundred dollars, *on demand*.”; Edwards on Bills, 131; 1 Am. Lead. Cas. (5th ed.), 383.

² Cummings v. Freeman, 2 Humph., 143; Marrigan v. Page, id., 247; Fleming v. Burge, 6 Ala., 373; Brenzer v. Wightman, 7 Watts & Serg., 264; Brewer v. Brewer, 6 Ga., 588; Lowe v. Murphy, 9 id., 341; Johnson v. Johnson, Minor (Ala.), 263; Harrow v. Dugan, 6 Dana., 341; Kilgore v. Bulkley, 14 Conn., 383.

³ Lord v. Harvey, 3 Conn., 372; DeForest v. Hunt, 8 id., 184; Austin v. Bostwick, 9 id., 501; Lee v. Wyse, 35 id., 384.

Claim of Defendant in Supreme Court.—Lockwood, contra for defendant said:

First. “A note must contain a legal promise for the certain payment of a certain sum.¹ An acknowledgment of a debt is not a promissory note.² The note must contain and must express the *promise* of the debtor to pay the money.”³

Secondly. “The statute of limitations applies. Our courts have never adopted the expedient which has prevailed to some extent in other states, of taking cases out of the statute upon some doubtful or equivocal acknowledgment, but have always held that the party must have intended to relinquish its protection, or that its provisions must be applied.⁴ An admission that the note was unpaid, accompanied by the claim that it was “outlawed,” is not sufficient to remove the bar of the statute.⁵ An offer to pay a certain sum in satisfaction of a larger one, will not remove the bar of the statute, even as it regards the sum actually offered, unless the offer is accepted when made.”⁶

Decision of the Court.—The *first* question in this case is whether the *writing sued upon is a promissory note within the meaning of those words in the statute of limitations*. The statute is as follows: “No action shall be brought on any bond or writing obligatory, contract under seal, or promissory note not negotiable, but within seventeen years next after an action shall accrue.” The instrument sued upon is as follows:

¹ 1 Parsons on Notes and Bills, 23, 24; Story on Prom. Notes, § 14; Bouvier's Law Dict., Due Bill, Promissory Note, and I. O. U.

² 1 Parsons on Notes and Bills, 25; Byles on Bills, 11, 28; Smith v. Allen, 5 Day, 340; Beeching v. Westbrook, 8 Mees. & Wels., 412; Melanotte v. Teasdale, 13 id., 216; Bowles v. Lambert, 54 Ill., 237.

³ 1 Parsons on Notes and Bills, 25.

⁴ Hart's Appeal from Probate, 32 Conn., 539.

⁵ Sanford v. Clark, 29 Conn., 460.

⁶ Bell v. Morrison, 1 Peters, 531; Smith v. Eastman, 3 Cush., 355; Mumford v. Freeman, 8 Met., 432; Brush v. Barnard, 8 Johns, 407; McLellan v. Albee, 5 Shepley, 184; 1 Smith Lead. Cas. (H. & W. Notes), part 2d, p. 876.

“\$17.14.

“ BRIDGEPORT, Jan. 22d, 1863.

“Due Currier & Barker seventeen dollars and fourteen cents, value received.

FREDERICK LOCKWOOD.

Promissory notes not negotiable are by the statute above recited put upon the footing of specialties in regard to the period of limitation, and for most other purposes such notes have been regarded as specialties in Connecticut. The instrument however to which this distinction has been attached is the simple express promise to pay money in the stereotyped form familiar to all. The writing given in evidence in this case is a due bill and nothing more. Such acknowledgments of debts are common and pass under the name of due bills. They are informal memoranda, sometimes here as in England in the form of “I. O. U.” They are not the promissory notes which are classed with specialties in the statute of limitations. The *law implies* indeed *a promise* to pay from such acknowledgments, but the promise is *simply implied* and *not expressed*. It is well said by Smith, J., in *Smith v. Allen*,¹ “*Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in a legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract.*”

In that case the words “*on demand*” were held to import and to be an express promise to pay. That case adopts the correct principle, namely, that to constitute a promissory note there must be an *express* as contra-distinguished from an *implied promise*. The words “*on demand*” are here wanting. The words “*value received*,” which are in the writing signed by the defendant, cannot be regarded as equivalent to the words “*on demand*.” The case of *Smith v. Allen* went to the extreme limit in holding the writing then given to be a promissory note, and we do not feel at liberty to go further in that direction than the court then went.

The writing then not being a promissory note, the plaintiff's action is barred by the six years clause of the statute, unless revived by a new promise to pay.

¹ 5 Day (Conn), 337.

The offer of the defendant to give a ton of coal for the note was not accepted. It was a mere offer of compromise, and clearly no acknowledgment to take the case out of the statute.

The conversation between the parties, recited in the motion, taken together as one transaction, was held by the Court of Common Pleas not to be sufficient evidence of a new promise. The result of the interview was a refusal to pay. The opening of the conversation on the part of the defendant would seem to admit the justice of the plaintiff's demand. The expression of a wish "*to settle the note*" would seem to imply that it was justly due; but the word "*settle*" is somewhat equivocal, and taking the whole interview together, we think the Court of Common Pleas made no mistake in law in deciding as it did.

A new trial is not advised.

In this opinion Park and Carpenter, Js., concurred.

FOSTER, J. That the paper before us is more correctly described as a due bill, than as a promissory note, is unquestionable. That it would be regarded among business men, in the daily transactions of life, as conferring the same rights, and imposing the same liabilities, as a promissory note, seems to me equally unquestionable. It was so regarded by the parties to it; it was so treated and so spoken of whenever it was alluded to. This is manifest from the record; "The defendant came into the store of said Barker (one of the plaintiffs), and said to him: 'Have you that note?' or 'Where is that note?' and that he 'wished to settle it.' Barker told him 'the note was in Mr. Steven's hands, etc.'" Any writing importing a debt, and an obligation to pay it, especially if it contains the words "*for value received*," is, in the popular judgment, a note. This instrument is clearly of that character. It was clearly the intent of the parties so to make it, and it is evident that they supposed they had so made it. To hold otherwise would seem to be contrary to the understanding and intent of the parties.

But it is claimed that this instrument is not, in law, a promissory note, and that the legislature, in passing the statutes of limitation, could never have intended to put such contracts on a footing with specialties.

Now if we examine the various works on bills of exchange and promissory notes, we do not find that the learned authors of those treatises agree upon any exact and precise definition of a promissory note. Chitty, Bayley, Byles, Story, and Parsons, however, all agree that no particular words are necessary to make a bill or note. "It is sufficient if a note amount to an absolute promise to pay money."¹ Chancellor Kent, following substantially Mr. Justice Bayley, says, "A note is a written promise, by one person to another, for the payment of money, at a specified time, and at all events."² Judge Parsons says, "A promissory note is, in its simplest form, only a written promise."³

These definitions imply that a note must contain an express promise to pay. And Mr. Justice Story says: "But it seems that, to constitute a good promissory note, there must be an *express promise upon the face of the instrument to pay the money*; for a *mere promise implied by law*, founded upon an acknowledged indebtedment, will not be sufficient."⁴ Courts of the highest authority, however, both in England and in this country, hold otherwise; nor are all the text-writers so to be understood. "No precise words of contract are necessary in a promissory note, provided they amount, in legal effect, to a promise to pay."⁵

What Words and Phrases are Equivalent to the Word "Promise."—*It is settled that a note need not contain the words 'promise to pay,' if there are other words of equivalent import.*⁶ What words are of "*equivalent import*," and are sufficient to raise a promise to pay, has occasioned much discussion. "The distinction between the cases on this point," says Mr. Justice Story, in a note on the section above quoted, "is extremely nice, not to say sometimes very unsatisfactory."

English Cases.—As long ago as 1795, C. J. Eyre, sitting

¹ Chitty on Bills, 428.

² 3 Com., 74.

³ 1 Parsons on Notes and Bills, 14.

⁴ Story on Prom. Notes, 14.

⁵ Byles on Bills, 8.

⁶ 1 Parsons on Notes and Bills, 24.

at Nisi Prius, held an “*I. O. U. eight guineas*,” to be merely an acknowledgment of a debt, and neither a promissory note nor a receipt.¹ In 1800, in the case of *Guy v. Harris*,² Ld. Eldon, whose authority is certainly not inferior to that of C. J. Eyre, held a similar paper to be a promissory note, and ruled it out when offered in evidence, because it had not a stamp. “I owe my father £470. Jas. Israel:”—This paper was offered in evidence before Ld. Ellenborough, and he said: “I entertain some doubts whether this paper ought not to have been stamped as a promissory note, but on authority of *Fisher v. Leslie*,³ I will receive it in evidence, though unstamped.”⁴ *If a time be named for payment, these instruments are differently construed.*⁵ In *Brooks v. Elkins*, “*I. O. U. £20, to be paid on the 22d inst.*,” was held to be either a promissory note, or an agreement for the payment of £10 and upwards, and in either case required a stamp. “*I. O. U. £85, to be paid May 5th*,” was held to be a good promissory note.⁶

The cases are numerous where an instrument has been held to be a good note without an express promise to pay. “I do acknowledge myself to be indebted to A. in £10, to be paid on demand for value received.” On demurrer to the declaration, the court, after solemn argument, held that this was a good note within the statute.⁷ In the case of *Morris v. Lee*,⁸ the words were, “I promise to be accountable to J. S., or order, for £50, value received by me,” and it was held a good promissory note. The court say they “*will take the word accountable as much as if it had been pay.*” They also notice the words *value received*. Fortescue, J. said, “This

¹ *Fisher v. Leslie*, 1 Esp., 425.

² Reported in *Chitty on Bills*, 526.

³ 1 Esp., 245.

⁴ *Israel v. Israel*, 1 Camp., 499. *Childers v. Boulnois*, Dow. & Ry., Nisi Prius cases, 8, decided by C. J. Abbot, is to the same effect. See also *Tompkins v. Ashby*, 6 Barn. & Cres., 541; 9 Dow. & Ry., 543; 1 Mees. & Wels., 32; S. C.

⁵ 2 Mees. & Wels., 74.

⁶ *Waithman v. Elzee*, 1 Car. & Kirw., 35.

⁷ *Cashborne v. Dutton*, 1 Selwyn, Nisi Prius, 320.

⁸ 1 Esp., 426.

is a debt, being for value received, and said on account.”¹
S. C.

American Cases.—Turning to the American cases, we find in our own court the case of *Smith v. Allen*.² This was brought on a paper in these words: “Due John Allen \$94.91, on demand.” The declaration counted on a promissory note, and alleged a promise to pay in the usual form, setting out the note in the declaration. The defendants demurred, and the Superior Court held the declaration sufficient. On writ of error brought, the Court of Errors sustained the decision.

Here was manifestly no express promise to pay; but the court held that there was one implied, and so sustained the claim of the plaintiff. The difference between this and the case at bar is very slight. This contains the words “*on demand*,” that at bar the words “*value received*.” The one by its terms is due on demand, and the promise to pay is, therefore, implied by law, the other is, in legal effect, due on demand, and it is difficult to see a good reason why the law does not as readily imply a promise to pay such a debt, as one due on demand by its own terms. Besides a valuable consideration is expressed in the case at bar by the words “value received,” while none is expressed in the case of *Smith v. Allen*. Since the case of *Edgerton v. Edgerton*,³ and the case of *Bristol v. Warner*,⁴ it is quite clear that, by the law of this state, a promissory note, not negotiable, and not purporting on its face to be for value received, does not imply a consideration. *Smith v. Allen* and the case at bar, are alike in omitting the words, “or order,” and “or bearer,” and so are alike non-negotiable. Such notes however are regarded as within the statute of 3 and 4 Anne.⁵

Passing from this decision in our own court to the courts of New York, where we are accustomed to find questions of mercantile and commercial law as ably discussed and as intel-

¹ 8 Mod., 362; 1 Strange, 629; 2 Ld. Raym., 1396.

² 5 Day, 337.

³ 8 Conn., 6.

⁴ 19 Conn., 7.

⁵ *Smith v. Kendall*, 6 T. R., 123.

ligently decided as in any of our sister states, we find the case of *Russell v. Whipple*.¹ The suit was on this paper, "Due S., or bearer, \$10." This differs from the case at bar in adding the words "*or bearer*," and omits the words "value received." The court says it was a promissory note, and that the case was too plain for argument.

In *Kimball v. Huntington*,² this paper, "Due R. \$325, payable on demand," was held admissible in evidence as a promissory note. Judge Nelson says: "The acknowledgment of indebtedness, on its face, implies a promise to pay the plaintiffs, and the payment by its terms is to be in money, absolutely, on demand."

In *Luqueer v. Prosser*,³ Judge Cowan says: "*If there be in legal effect an absolute promise that money shall be paid, all the rest is a dispute about words. * * * The whole inquiry is, does the paper import an engagement that money shall be paid, absolutely? If it do, no matter by what words, it is a good note.*"

In *Sackett vs. Spencer*,⁴ this paper, "Due S. or bearer, \$340, *for value received with interest*," the court says "is a good promissory note, and if it specifies no time of payment, it is, in legal effect, payable immediately, and without grace."

In *Franklin v. March*,⁵ the Supreme Court of New Hampshire held this paper, "Good to R. C. *or order*, for \$30, borrowed money," to be a good promissory note.

In addition to the cases above cited, the following are very strong authorities to sustain the claim that this is a promissory note.⁶ In *Johnson v. Johnson*,⁷ the court say: "The

¹ 2 Cow., 536.

² 10 Wend., 675.

³ 1 Hill, 259.

⁴ 29 Barb., 180.

⁵ 6 N. Hamp., 364.

⁶ *Cummings v. Freeman*, 2 Humph., (Tenn.) 143, where the note read "Due J. F. \$200—borrowed Oct. 21"; *Harrow v. Dugan*, 6 Dana, 341; *Flemming v. Burge*, 6 Ala., 373; *Finney v. Shirley*, 7 Mo., 42; *McGowan v. West*, id., 569; *Lorne v. Murphy*, 9, Geo., 338.

⁷ 1 Ala., 263.

Promissory notes must contain a specific promise to pay. The

acknowledgment of a debt, due for a valuable consideration, clearly implies a promise to pay it on request."

promise must be expressed or implied. No precise words of contract are necessary, provided they amount, in legal effect to a promise to pay.

Byles on Bills, 8; Gordon v. Rundlett, 28 N. H., 435. A mere acknowledgment of indebtedness is not sufficient to constitute a promise.

The Following Expressions have been held to Amount to Promises: "Due C. or order"; "due C. on the first day of May"; "due C. or bearer"; "good to bearer"; "due A. B. on demand"; "I acknowledge myself indebted to C. to be paid on demand". The words "on demand" and "to be paid on day" and "or order", "or bearer" have been thought in themselves to show that the debtor intended to do more than merely state the balance due on account. These words clearly recognize an obligation and a promise to pay. Where a writing contained nothing more than a bare acknowledgment of a debt, it does not, in legal construction, import an express promise to pay; but where a writing imports not only the acknowledgment of a debt, but also an agreement to pay it, this amounts to an express contract. Smith v. Allen, 5 Day, 337; Russell v. Whipple, 2 Cow., 536; Currier v. Lockwood, supra.

A mere promise implied by law, founded on an acknowledged indebtedness will not be sufficient. Brown v. Gilman, 13 Mass., 158. In order to constitute a good promissory note there should be an express promise on the face of the instrument to pay the money. While the promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay, may fairly be deduced therefrom. Gay v. Rooke, 151 Mass., 115. Therefore the following instrument, "I. O. U., E. A. Gay, the sum of seventeen dollars for value received. (Signed) John R. Rooke," is an acknowledgment of a debt by the maker, but not a promissory note. Gray v. Bowden, 23 Pick., 282; Gay v. Rooke, 151 Mass., 115; Almy v. Winslow, 126 Mass., 342. Some of the states, however, have by statute extended the law of bills and promissory notes to all instruments in writing whereby any person acknowledges any sum of money to be due to any other person. Rev. Sts. Ind., Sec. 5501; Rev. Sts. Ill., C. 98, Sec. 3; Code, Iowa, Sec. 2085; Gen'l Laws, Colo., 110, Sec. 90; see also statutes of Idaho, Indiana and Mississippi.

Upon the subject of this requisite, it must be said that there is great confusion and quite a conflict of authority. The general rule as stated above is undoubtedly true, but there are some cases which hold to the contrary.

In some states it has been held that mere statements of indebtedness are promissory notes. Thus:

The record discloses the fact that the paper before us was given for the purchase of clothing, and that the price of it has never been paid. Our statute of limitation bars all right

“\$525

Due G. S. Warren, on corn, five hundred and twenty-five dollars. J. JACQUIN.”

Held to be a negotiable promissory note. Jacquin v. Warren, 40 Ill., 459.

Again:

Due B. \$150.00.

A”.

Held to be a note. Brady v. Chandler, 31 Mo., 28.

Many cases have held that the addition of such words as, “on demand”, “payable on demand”, “to be paid”, etc., were sufficient to convert due bills into notes. The principle may be best illustrated by citing and condensing a few cases:

“\$500.00.

ROME, September 10, 1846.

Due the Memphis Branch R. R. and Steamboat Co., of Georgia, five hundred dollars *payable on demand*.

D. R. MITCHELL.”

Held to be a good promissory note. 17 Ga., 574.

“I do acknowledge myself to be indebted to A. in 500 pounds, *to be paid on demand* for value received. B.”

Held to be a note. The words “to be paid on demand” being held to amount to a promise to pay. Cashburne v. Dalton, P. on B. & N., 8th edit., 371.

In Brooks v. Elkins, 2 M & W., 74, the following instrument was held to require a stamp:

“11th October, 1831.

“I. O. U. 20 pounds *to be paid on the 22nd instant*.

W. BROOKS.”

“I have received the imperfect books which together with the cash overpaid on the settlement of your account amounts to 80 pounds, which sum I will pay in two years.”

Held to be a note. Wheatly v. Williams, 1 M. & W., 533.

A few cases showing a negative construction will further illustrate the principle:

“I have received the sum of 20 pounds which I borrowed from you and I have to be accountable for the said sum with interest.”

Held to be an *agreement* but not a *note*. Horn v. Redfearne, 4 Bing. N. C., 433. The phrase “to be accountable” is not an equivalent.

“I. O. U. 45 pounds 13 shillings which I borrowed of Mrs. Melanotte, and to pay her 5% till paid.

ROBERT TEASDALE.”

Held, not to be a note. Melanotte v. Teasdale, 13 M. & W., 216.

“Memorandum. Mr. Sibree has this day deposited with me

of action upon it, unless it is recognized as a promissory note. So to recognize it will in my opinion do much less violence to law, than will be done to justice if we permit this defendant

500 pounds on the sale of 10300 pound 3% Spanish, to be returned on demand.

JAMES S. TRIPP."

Held, not to be a note. Sibree v. Tripp, 15 M. & W., 23.

"11th September, 1839.

"I undertake to pay to Mr. Robert Jarvis the sum of 6 pounds 4 shillings for a suit of clothes *ordered* by Daniel Page.

S. W. WILKINS."

Held to be a *guarantee*, and not a note. Jarvis v. Wilkins, 7 M. & W., 410.

In the above case Baron Parke said that had "supplied" been inserted instead of "ordered" it would have been a good note.

"At twelve months after date, I promise to pay R. & Co., 500 pounds to be held by them as collateral security for moneys now owing them by J. M., which they may be unable to receive on realizing the securites they now hold and others which may be placed in their hands by him."

Held not to be a note. Robbins v. May, 11 Ad. & E., 213.

It will thus be seen that it is by no means essential that the word "promise" be inserted in a writing to make it a promissory note. If, in fair legal intendment, it amounts to a "promise" to pay, courts will regard it as sufficient. In accordance with this doctrine, certificates of deposit have been held to be notes, the necessary promise being inferred from the nature of the instrument. Miller v. Austin, 13 How., 218.

And, if these certificates be payable to "A." or "Bearer," they are considered negotiable promissory notes payable to the holder. Maxwell v. Agnew, 21 Fla., 1154.

See also, "receipts" for money when containing a promise of re-payment are promissory notes and are negotiable, Green v. Davies, 4 B. & C., 235.

This is also true of receipts for money to be "returned when called for." Woodfalk v. Leslie, 2 Nott & McC., 585.

But otherwise, when the receipt is merely for money "held subject to order." Roman v. Terna, 40 Tex., 306.

Or when the receipt is for money "to be accounted for," it does not amount to a note. Tomkins v. Ashby, 6 B. & C., 541.

What Words will Import a Promise to Pay.—

The contract need not contain the words "promise to pay"; there are other words of equivalent meaning. It has been held that wherever there is an acknowledgment of a debt together with the use of any of the following words, the contract (if the other essentials appear) will be a good negotiable instrument: "On demand"; "value received"; "to be paid on May 5"; "I promise to be 'accountable' on demand"; "or order"; "or bearer"; "to

thus to escape the payment of an honest debt for the necessities of life.

be paid"; "John Mason, 14th Feb., 1836, borrowed of Mary, his sister, the sum of 14 pounds in cash, as per loan, in promise of payment, for which I am truly thankful," (Ellis v. Mason, 7 Dowl., 598). In some jurisdictions the word "due" has been held to import a promise to pay. Jacquin v. Warren, 40 Ill., 459; Lee v. Balcom, 9 Colo., 216; 11 Pac. Rep., 74; Anderson v. Pearce, 36 Ark., 293; Brady v. Chandler, 31 Mo., 28. See statutes of your state.

See upon the principal propositions, Green v. Davis, 4 B. & C., 239; Wheatley v. Williams, 1 M. & W., 533; Casborne v. Dutton, Selwyn's Nisi Prius, 329; Kimball v. Huntington, 10 Wend., 675; Block v. Bell, 1 M. & R., 149; Israel v. Israel, 1 Camp., 499; Brooks v. Elkins, 2 M. & W., 74; Waithman v. Elsee, 1 C. & K., 35; Dullea v. Emery, 2 Cr. & D. C. C., 506; Ellis v. Mason, 7 Dowling, 598; White v. North, 3 Exch. Rep., 689 (18 L. J. Rep. [N. S.] Exch., 316); Shrivell v. Payne; 8 Dowling, P. C., 441; Forward v. Thompson, 12 Upper Canada, Q. B. Rep., 103; Robinson v. Bland, 2 Burr., 1077; Dickenson v. Teague, 23 L. T. Rep., 65; Ball v. Allen, 15 Mass., 433; Gordon v. Rundlett, 28 N. H., 435; Smith v. Allen, 5 Day (Conn.), 337; Russell v. Whipple, 2 Corv. (N. Y.), 536; Carver v. Hayes, 47 Me., 257; Bacon v. Bicknell, 17 Wis., 523; Huyck v. Meador, 24 Ark., 191; Franklin v. March, 6 N. H., 364; Bank of Orleans v. Merrill, &c., 2 Hill (N. Y.), 295; Miller v. Austen, 13 How., 218; Poorman v. Mills, 35 Cal., 118; Blood v. Northrup, 1 Kans., 28; Howe v. Hartness, 11 Ohio St., 449; Cate v. Patterson, 25 Mich., 191; Tripp v. Curtenius, 36 Mich., 494; Hunt v. Divine, 37 Ill., 137; Lafayette Bank v. Ringell, 51 Ind., 393.

Due Bills.—In some jurisdictions an ordinary due-bill such as: "due A"; "I. O. U.", have been held to be good promissory notes. Jacquin v. Warren, 40 Ill., 459; Lee v. Balcon, 9 Colo., 216; Fleming v. Burge, 6 Ala., 373; Brady v. Chandler, 31 Mo., 28; St. Louis R. R. Co. v. Camden Bk., 47 Ark., 545.

This, however, is clearly against the weight of authority. Currier v. Lockwood, 40 Conn., 348; Fisher v. Leslie, 1 Esp., 425; Guy v. Harris (1800), Chitty on Bills, 426; Israel v. Israel, 1 Camp., 493; Gay v. Rooke, 23 N. E. Rep. (Mass.), 835; Brooks v. Elkins, 2 M. & W., 74; Payne v. Jenkins, 4 Car. & P., 335; Smith v. Smith, 1 F. & F., 539; Gould v. Courbs, 1 C. B., 543; Bowles v. Lambert, 54 Ill., 237 (1870); Carson v. Lucas, 13 B. Mon., 213 (1852); Garland v. Scott, 15 La. An., 143.

In order to amount to a promissory note the *words used* must at least be words from which a *promise* to pay money can be implied. Price v. Jones, 105 Md., 543; Strickland v. Holbrook, 75 Cal., 268.

I would admit the paper offered in evidence in support of the first count in the declaration.

In this opinion PHELPS J., concurred.

An I. O. U. which does not contain any promise to pay is generally held not to constitute a promissory note, but is a mere evidence of an account stated. *Gray v. Bowden*, 23 Pick., 282; *Almey v. Winslow*, 126 Mass., 342; *Fisher v. Leslie*, 1 Esp., 425. *Israel vs. Israel*, 1 Camp. 499; *Carnwright v. Gray*, 127 N. Y., 93.

It has recently been held in New York that a written statement that a certain amount of money is due a payee therein named, followed by the signature of the maker of the statement, implies that the money is due from the maker and is an acknowledgment of indebtedness. The acknowledgment of the indebtedness, and that it is due, implies a promise to pay it on demand. *Hageman v. Moon*, 131 N. Y., 462.

An instrument merely acknowledging a deposit, cannot be regarded as a promissory note. There must be some word or statement raising a promise to pay. *Kilgore v. Bulkley*, 14 Conn., 363, 383; *Patterson v. Poindexter*, 6 Watts & Serg., 227; *Sibree v. Tripp*, 15 M. & W., 23. In *Tomkins v. Ashby*, (6 B. & C., 541) (1 M. & M., 32) it was held that the following memorandum, "Mr. T. has left in my hands 200 pounds" was not a promissory note. See also *Payne v. Jenkins*, 4 Car. & P., 335; *Children v. Boulnois*, Dow. & Ry., 8; *Little v. Slackford*, M. & M., 171.

Neither will the written acknowledgment, on the back of a contract, acknowledging it to be due, signed by the promisor, create a promise to pay the sum named in the contract. *Gray v. Bowden*, 23 Pick., 282; *Almey v. Winslow*, 126 Mass., 342; *Daggett v. Daggett*, 124 Mass., 149; *Biskup v. Oberle*, 6 Mo. App., 583.

Promise to Give.—Where the words used in a negotiable contract import a promise "to give" simply a certain sum of money they will not create a promissory note. *Caviness v. Rushton*, 101 Ind., 500; *Johnston v. Griest*, 85 Ind., 503; *Williams v. Forbes*, 114 Ill., 167; *Kirkpatrick v. Taylor*, 43 Ill., 207; *Pratt v. Trustees*, 93 Ill., 475.

SECTION 14.

**THE ORDER IN A BILL AND THE PROMISE IN A NOTE MUST
BE ABSOLUTE AND UNCONDITIONAL.**PEARSON *v.* GARRETT,¹

IN THE KING'S BENCH, TRINITY TERM, 5 WILL & MARY, 1694.

[*Reported in 4 Modern Rep. 242.*]

Form of Action.—John Pearson complains of John Garrett, being in the custody of the marshal, &c., for that, to wit, Whereas the city of London is an ancient city; and also whereas in the same city; to wit, at the parish of St. Mary le Bow, in the ward of Cheap, there is and hath been, from time immemorial, an ancient and laudable custom, approved and used in the same, between merchants and other persons inhabiting in the same city, namely, that if any person inhabiting in the said city shall make any bill or note in writing subscribed under his hand, and by the same bill or note he should promise to pay any person any sum of money at any time or any times in the same bill or note mentioned, such person who made the same bill or note, by the same promise and consideration aforesaid, among merchants and other persons aforesaid, so as aforesaid used and approved, is bound to pay the same sum of money in the same bill or note mentioned to the same persons to whom promise of payment thereof by the same bill or note was made to pay the same at the time or times in and by the same bill and note for payment thereof is denoted, according to his promise aforesaid. And whereas, on the 21st day of October, in the fourth year of the reign of the Lord William and the Lady Mary, the now king and queen of England, &c., at London aforesaid, to wit, in the parish of St. Mary le Bow, in the ward of Cheap aforesaid, the same John Garrett was a

¹ This case is cited in Chitty on Bills, 12, 135, 517; Story on Bills of Exchange, 46; Wood's Byles on Bills & Notes, 168; Benjamin's Chalmers on Bills, Notes and Checks, 27; Daniel on Negotiable Instruments, 41; Tiedeman on Commercial Paper, 25; Randolph on Commercial Paper, 153; Norton on B. & N., 38; Ames on B. & N., 30 n.

person residing in the city of London aforesaid, and so there residing on the same 21st day of October, in the fourth year aforesaid, in the parish and ward aforesaid, by a certain note in writing, subscribed with his own proper hand, promised to pay to the said John Pearson, or his assigns, sixty pounds within two months next after the aforesaid John Garrett should be lawfully married to one Elizabeth Petty, that is to say, fifty pounds thereof for himself, the aforesaid John Pearson, and ten pounds thereof for his wife. And the same John Pearson in fact saith, that the aforesaid John Garrett afterwards, to wit, on the 28th day of February, on the fifth year of the reign of the said lord the now king and lady the now queen, at London aforesaid, in the parish and ward aforesaid, to the said Elizabeth Petty was lawfully married; by which, and by force of the custom aforesaid, the aforesaid John Garrett became bound to pay to the said John Pearson the said sixty pounds, according to his promise aforesaid; and thereupon in consideration of the premises, the aforesaid John Garrett, then and there, to wit, on the 28th day of February, in the fifth year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said John Pearson, then and there, that he the said John Garrett the aforesaid sixty pounds to the said John Pearson, within two months next after the marriage aforesaid had, well and truly to pay and satisfy. Nevertheless the aforesaid John Garrett, not regarding his promise and undertaking aforesaid, but contriving and fraudulently intending the said John Pearson in this behalf craftily and subtilely to deceive and defraud, the said sixty pounds, or any part thereof, to the said John Pearson hath not yet paid, although to do it the said John Garrett afterwards, to wit, on the 2d day of May, in the fifth year aforesaid, at London aforesaid, in the parish and ward aforesaid, by the same John Pearson was required; but the same John Garrett to pay him the same, or him for the same hitherto in any wise to satisfy, hath altogether refused, and yet doth refuse. Therefore the said John Pearson says, that he is thereby injured, and hath received damage to the value of one hundred pounds. And therefore he produces the suit, &c.

Form of Defense.—To this declaration the defendant demurred, and the plaintiff joined in demurrer.

The action was brought upon a note for the payment of sixty guineas when the plaintiff should marry such a person, &c., in which the plaintiff declared, as upon a bill of exchange, setting forth the custom of merchants, &c.¹

The exceptions taken were, viz., 1st, that the plaintiff does not aver that he was a merchant, or 2d, that the note was made *secundum consuetudinem mercatorum*; and 3d, neither has he laid any consideration.

This is not such a custom amongst merchants of which this Court is obliged to take notice as part of the law of the land; for in truth there is no such custom; it is only an agreement founded upon a brokage, and therefore cannot be within the custom of merchants; neither was there ever yet any precedents to pay money upon such a collateral contingency. It is no more than a voluntary note given with a present consideration; and if such should be allowed to be within the custom of merchants, then everything which is given without a consideration may be as well within the custom, which would quite change the law.²

Reply of Plaintiff.—The question is, Whether this custom be good or not?³ It is sufficiently alleged in the declaration; it is not laid to be inter mercatores only, but inter alias personas residentes, &c.; and if such a custom can be good, then it is admitted to be so by the demurrer. Dr. Witherly's son brought the like action upon a note; and he was a gentleman, and no trading merchant, but traveling into France, and had judgment, which was affirmed in the exchequer chamber.⁴ No

¹ An action brought by the payee of a contract (as a negotiable contract), by which the drawer or maker promises to pay a certain sum of money within two months after the drawer or maker shall have married cannot be sustained; for such a contract is not within the custom of merchants. 1 Salk., 129; 1 Strange, 674; 2 Bl. Com., 446; 3 Burrows, 1637, 1670; 2 Ld. Raymond, 757.

² 8 Mod., 265, 307, 362; 10 Mod., 286, 294; 11 Mod., 180; 12 Mod., 15, 36, 380.

³ 1 Ld. Ray, 175, 281, 744, 759, 1481.

⁴ Sarsfield v. Witherley, 1 Show., 125; Comb., 45; 2 Ventris., 292; Holt, 123.

reason can be offered why such a note should not bind as well as a bond, since the consideration for which it was given was very just, for it is lawful for one man to help another to a wife.

The Decision.—If the note had been given by way of commerce it had been good, but to pay money upon *such a contingency* cannot be called trading, and therefore not within the custom of merchants.

Judgment was given for the defendant.¹

¹ By 3 & 4 Ann. c. 9 it is provided that, "All notes in writing signed by any person, whereby such person shall promise to pay to any other person, or his order or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be due and payable to the person to whom the same is made payable, and shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants; and the person to whom such money is, by such note, made payable, may maintain an action for the same as upon an inland bill of exchange, drawn according to the custom of merchants, against the person who signed the same; and the person to whom such note is indorsed may maintain his action for the money, either against the drawer or any of the indorsees, as in cases of inland bills of exchange." This act being for the benefit of commerce, is to be liberally construed, 3 Wilf. 1; but no notes are within the benefit of it, unless they would, as bills of exchange, have been within the custom of merchants. *Martin v. Chauntry*, 2 Stra., 271; *Bull., N. P.*, 273; *Joscelyne v. Lassere*, Fort., 281; *Jenny v. Hale*, 8 Mod., 265; *Jefferies v. Austin*, 1 Stra., 674; *Kyd on Bills of Exchange*, 33 to 37; and see *Beardsley v. Baldwyn*, 2 Stra., 1151, in point.

Payment Must Not Depend Upon a Contingency.—The order and the promise contained in commercial contracts must be simple, certain, unconditional and not subject to any contingencies. And hence, the general rule is, *that a negotiable contract must not be limited in payment to particular circumstances and events, which cannot be known to the holder of such instruments, in the general course of its negotiations; and if the contract wants upon its face this essential quality, or character of certainty, the defect is fatal* It is then nothing more than a common law obligation. *Carlos v. Fancourt*, 5 Term R. 482; *Dawkes v. Earl of Dolovaine*, 2 Wm. Black., 782; *Citizens Nat. Bk. v. Piollet*, 126 Pa. St., 194; *Chandler v. Carey*, 64 Mich., 237; *Siegel v. Bank*, 131 Ill., 569; *Culbertson v. Nelson*, 61 N. W. Rep., 854. An order or promise to pay out of a particular fund will render the instrument conditional. If however the order or promise simply indicates a fund out of which reimbursement may be had, it is not

conditional. *Worden v. Dodge*, 4 Denio, 159; *Richardson v. Carpenter*, 46 N. Y., 660; *Munger v. Shannon*, 61 N. Y., 251; *Cota v. Buck*, 7 Metc. (Mass.), 588; *Miller v. Poage*, 56 Ia., 96; *Schmittler v. Simon*, 101 N. Y., 554. Therefore, a promise to pay "out of my father's estate;" "or out of the growing substance;" "or on the return of this certificate;" "or in one and one-half years at my option;" or "a promise to pay with a right to extend the time of payment," or "with an understanding that the contract will be renewed at maturity," have been held not to be good commercial contracts on account of conditions. So also will a promise to pay, "out of rents" or "out of A's money when he shall receive it," or "on the sale of certain property or produce" or "out of a certain fund," or "on account of freight" or "when the drawer shall come of age" or "thirty days after the ship 'A', shall arrive," be bad for uncertainty. *Palmer v. Pratt*, 2 Bing. R., 185; *Colehan v. Cooke*, Willes R., 393; *Jenny v. Earle*, 2 Ld. Raymond, 1361; *Goss v. Nelson*, 1 Bun. R., 226; *Banbury v. Lisset*, 2 Strange R., 1211; *De Forrest v. Frary*, 6 Cow. (N. Y.), 151; *Ferris v. Bond*, 4 Barn. & Ald. 679; *Beardsley v. Baldwyn*, 7 Mod. R., 417 (reported also in 2 Strange, 1151); *Willis, R.*, 399, (where the promise was to pay, "when the drawer shall marry," which was held to be conditional and therefore bad). *Pearson v. Garrett*, 4 Mod. Rep., 242; *Brooks v. Hargreaves*, 21 Mich., 255; *Chandler v. Carey*, 64 Mich., 238; *Cushing v. Field*, 70 Me., 50; *Costello v. Crowell*, 127 Mass., 293; *Woodburry v. Roberts*, 59 Ia., 348; ("when the estate of 'M' is settled up,") *Husband v. Eqling*, 81 Ill., 172; *Jennings v. Bank*, 22 Pac. Rep., 777.

In some jurisdictions it has been held, that, where payment was a certain time after sight, or when realized, it was upon condition and therefore bad. *Alexander v. Thomas*, 16 Adol. & Ellis, 333; 16 Q. B., 333; *Charlton v. Reed*, 61 Iowa, 166. See also the following cases upon the general proposition; *Blackman v. Lehman*, 63 Ala., 547; *Power v. Ward*, 6 Gray, 175; *Stults v. Silva*, 119 Mass., 137; *Worth v. Case*, 42 N. Y., 363; *Fleury v. Tufts*, 25 Ill. App., 101; *Blake v. Coleman*, 22 Wis., 396; *White v. Cushing*, 88 Me., 339.

If the bill or note contains, in addition to the order or promise to pay money, an order or promise to do an act it will not be sustained as a negotiable instrument. *Davies v. Wilkinson*, 10 Ald. & El., 98; *Killam v. Schœps*, 26 Kans., 310; *Cook vs. Satterlee*, 6 Con., 108; *Leonard v. Mason*, 1 Wend., 522; *Valley Nat. Bk. v. Crowell*, 148 P. St., 284; *Osborn v. Hawley*, 19 Ohio, 130; *First Nat. Bk. v. Slaughter*, 98 Ala., 602; *Hodges v. Shuler*, 22 N. Y., 114.

The instrument may, however, contain a statement showing the facts out which the transaction arose without becoming conditional. *Siegel of v. Chicago &c. Bank*, 131 Ill., 569; *Stevens v. Blunt*, 7 Mass., 240; *Davis v. McCready*, 17 N. Y., 320.

The Reason for the Rule.—Judge Story has well stated the reason for this essential of bills and notes, to be “that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit, circulation, and negotiability, if paper securities of this kind were issued out into the world, encumbered with conditions and contingencies; and if the persons to whom they are offered in negotiation, were obliged to inquire, when these uncertain events would probably be reduced to certainty, and whether the conditions would be performed or not.” Story on Bills of Exchange, Sec. 46; *Jenny v. Earle*, 2 *Ld. Raymond*, 1361; *Colehan v. Cooke*, *Willes, Rep.*, 393; *Goss v. Nelson*, 1 *Burr.*, R., 226; *Dankes v. Earl*, etc., 2 *W. Black.*, 782; *DeForest v. Frary*, 6 *Cow. (N. Y.)*, 151; *Banbury v. Lisset*, 2 *Strange*, 1211.

In *Clarke v. Perceval*, 2 *B. and Ad.* 660, the instrument was in the following form:

“£1200.

“WARRINGTON, 4th March, 1824.

On demand, we promise to pay Mr. George Clark, or order, Twelve hundred pounds, for value received, in stock, ale, brewing vessels, etc., this being intended to stand against the undersigned Mary Perceval as a setoff for the sum left me in my father's will above my sister Anne's share.

THOMAS PERCEVAL,
MARY PERCEVAL.”

(Witness) WILLIAM HALL.

The court of King's Bench held that the twelve hundred pounds was *not* payable *at all events* and the instrument was, therefore, *not* a promissory note.

The Bill or Note will be Sustained if the Condition is Sure to Happen.—A negotiable contract may be made payable upon some condition or the happening of some event, if the condition or the event is sure to come to pass. Thus a promise to pay “ten days after the death of A” will be sustained, for that event is sure to happen. *Roffey v. Greenwell*, 10 *Al. & E.*, 222; *Price v. Taylor*, 5 *Hurl. & N.*, 540; *Protection Insurance Co. v. Bill*, 31 *Conn.*, 204; *Goss v. Nelson*, 1 *Burr.*, 228. In the case of *Andrews v. Franklin*, the promise was “to pay within two months after the ship ‘Swallow’ is paid off.” This was supported on the ground that the paying off of the ship is a thing of a public nature and will therefore come to pass. 1 *Strange*, 24 (1717); *Evans v. Underwood*, 1 *Wils.*, 262; *Beardsley v. Baldwin*, 7 *Mod.*, 417, 419. If the time of payment must surely come, though the particular day is not mentioned, nor perhaps ascertainable at the inception of the contract, the note or bill is good and negotiable. Thus notes payable a certain time after a man's death, have been held good; for it is certain that every man must die. *Bristol v. Warner*, 19 *Conn.*, 7; *Conn. v. Thornton*, 46 *Ala.*, 588.

“As soon as realized” and “to be paid during the coming

season" occurring in the same note and read together have been held not a condition, as payment must be due before the close of harvest. *Cota v. Buck*, 7 Metc., 588.

Notes Payable at the "Convenience" of the Maker are Payable Within a Reasonable Time.—In the cases, we find instances of notes containing statements of the time of payment which, if taken literally, would enable the maker to refuse payment forever. In these instances, the courts have held the notes to be due a *reasonable* time after their date. *Works v. Hershey*, 35 Ia., 340; *Crooker v. Holmes*, 65 Me., 195.

In the 35 Ia., 340, the promissory note was in the following form:

"On demand after date, I promise to pay to the order of Niles Brooks \$2,512.87 payable at Cincinnati when convenient."

Held, that the maker was bound to pay within a reasonable time after the date of the note. In discussing the construction of the note, Beck, C. J., said: "The words 'payable at Cincinnati, *when convenient*,' cannot be construed to nullify the other words of the instrument, viz., '*On demand*, I promise to pay.' If any force be given to them it will be that the maker bound himself within a reasonable time to pay the amount, after the date of the note."

In the 65 Me., 195, the language of the court was: "Where the maker of a note promises to pay a certain sum when he shall sell the place he lives on, the debt is absolute, though its payment may be postponed; it is the duty of the maker to sell within a *reasonable time*, that he may discharge his indebtedness; he cannot avoid liability by putting it out of his power to perform his contract."

In *De Wolfe v. French* (51 Me., 420), it was held, that where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time of payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time. In *Sears v. Wright* (24 Me., 278), this rule was followed where the note was payable "from the avails of the logs bought of M. M., when there is a sale made."

In *Smithers v. Junckers* (41 Fed. Rep., 101), Gresham, J., held the following *to be a good promissory note* and payable within a *reasonable time*:

"Chicago, Ill., Nov. 1, 1883.

"For value received I promise to pay to S. F. Smithers two thousand and forty-eight and 25-100 dollars, payable at my convenience, and upon this express condition, that I am to be sole judge of such convenience and time of payment.

A. Junckers."

The same rule was applied in the case of *Lewis v. Tipton*, 10 Ohio St., 88, where the promise was to pay "when I can make it

convenient." Edwards on Bills of Exchange and Promissory Notes, 154, note 4, Capron v. Capron, 44 Vt., 410.

Conditions may be Imposed by an Indorsement.—A negotiable contract, absolute in form, may be made conditional by an indorsement made before delivery. In the case of Barnard et al. v. Cushing et al. (4 Metc., 230), the contract was an absolute promise to pay with the indorsement "*We agree not to compel payment for the amount of this note, but to receive the same when convenient for the promissor to pay it.*" It was held that no action could be maintained upon this promise. See also Hartley v. Wilkinson, 4 Camp., 127; 4 M. & S., 25.

Inconsistent Conditions will be Disregarded.—Bayley in his work on Bills cites a case (2 Atk., 32) where the note read, "Borrowed of J. S. 50 pounds, which I promise *never* to pay." The court rejected the word "*never*" and held the promissor liable. A note payable "*when payor and payee mutually agree*" is payable in a reasonable time. Page v. Cook, June 21, 1895 (Mass.); 41 Northeastern Rep., 115. In the case of Ubsdell v. Cunningham (22 Mo., 124), the promise was "*as soon as collected from my accounts at P.*", and it was held to be an absolute promise to pay.

A "promise to pay if my brother does not" upon a contingency will not be supported. Appleby v. Biddolph, 8 Mod., 303 (1717). A promise to pay "at four years after date, if I am then living, otherwise this bill to be null and void, is payable upon a contingency and not a good negotiable contract. Braham v. Bubb, Chitty on Bills of Exchange 87 (1826); Gillilan v. Myers, 31 Ill., 525; Eldrhd v. Mallory, 2 Colo., 320; Hays v. Gwin, 19 Ind., 19. "I promise to pay or cause to be paid," is not good, Lovell v. Hill, 6 C. & P., 238; Shenton v. James, 5 Q. B. Rep., 199; Jarvis v. Wilkins, 7 M. & W., 410; Munger v. Shannon, 61 N. Y., 251; McGee v. Larramore, 50 Mo., 425; Blake v. Coleman, 22 Wis., 415.

A Condition which Changes the Time of Payment Does Not Destroy the Bill or Note.—It is no objection to a note payable at a certain date that it permits payment before maturity. Thus a note at twelve months "*or sooner if made out of a certain sale*" is good. Mahoney v. Fitzpatrick, 133 Mass., 134; Ernst v. Steckman, 74 Pa. St., 13; Walker v. Woolen, 54 Ind., 164; Woolen v. Ulrich, 64 Ind., 120; Palmer v. Hammer, 10 Kan., 464; Helmer v. Krolick, 36 Mich., 371.

If it is made payable absolutely at some time certain unconditionally, it will be sustained, even though by some possibility it may be paid sooner.

To illustrate in the note as follows:

"Ann Arbor, Mich., May 24, 1898.

"Six months after date I promise to pay John Doe or order, one hundred dollars, for value received, or as soon as I can sell my property.

RICHARD ROE."

There is an absolute promise to pay at a time certain, but may be paid at an earlier date. The fact that it may be paid before the time stated does not make the promise conditional. *Ernst v. Steckman*, 74 Pa. St., 13; *Charlton v. Reed*, 61 Ia., 166; *Palmer v. Hammer*, 10 Kans., 464; *Woolen v. Ulrich*, 64 Ind., 120.

Nor does it invalidate the note, if it recites that on payment, the payee shall sell a machine to the maker. *Hawley v. Bingham*, 6 Or., 76.

Nor does a reservation in the note of a right to pay in United States bonds invalidate the instrument as a negotiable security. *Dinsmore v. Duncan*, 57 N. Y., 573.

The words, "payable on the return of this certificate," inserted in the document, if a condition at all, constitutes a lawful one, being merely a demand for the surrender of the evidence of indebtedness. *Smilie v. Stevens*, 38 Ver., 316.

Conditions, to be Binding, must appear upon the Bill or Note.—Conditions to effect negotiability must appear on the face of the written instrument, and when not so appearing, cannot be proven by parole. *Jones v. Shaw*, 67 Mo., 667; contra 4 Metc. 230 *supra*.

In discussing this question, a Texas court laid down the following proposition:—"Where a bill payable at a certain day is presented for acceptance and dishonored, the payee may sue the drawer at once; and a plea by the latter setting up an oral agreement made previous to or contemporaneous with the drawing of the bill, that the drawer should not be liable to pay the amount of the bill until the time stipulated, is bad; for the reason that it proposes to vary by oral evidence the legal effect of a contract in writing."

During the American civil war, notes were frequently given payable a certain time "after peace," or the "ratification of peace" between the United States and the Confederate States. In some states, these obligations have been held actionable upon the cessation of hostilities; while in others they have been declared invalid as being conditioned upon the success of *insurrection*. *Brewster v. Williams*, 2 S. Car., 455; *Knight v. McReynolds*, 37 Tex., 204.

A note or bill payable out of a particular fund is not payable at all events and unconditionally, inasmuch as the fund may prove deficient. *Atkins v. Marks*, 1 Cow., 691. There is an exception, however, in case the person having possession of the fund drawn upon accept the bill so drawn. This establishes the negotiability of the instrument at once, and, as between drawer and payee it operates even before acceptance as an equitable assignment of the fund it refers to. *Am. & Eng. Encyclo.*, 320.

SECTION 15.

THE ORDER IN A BILL AND THE PROMISE IN A NOTE
MUST BE FOR THE PAYMENT OF MONEY ONLY.RHODES v. LINDLEY.¹

IN THE SUPREME COURT OF OHIO, DECEMBER, 1827.

[*Reported in 3 Ohio, 51.*]

Form of Action.—This was an action of assumpsit, upon a note of hand given by the defendant, to Hezekiah Rhodes or bearer, promising to pay fifty dollars, at a day subsequent, “in good merchantable whisky, at trade price.” The declaration set forth, in terms, an assignment and delivery of the note to the plaintiff, and claimed to recover as bearer.

Form of Defense.—The defendant demurred, and assigned as a cause of demurrer, that the note was not negotiable.

The court of common pleas in Trumbull county gave judgment for the plaintiff, and the defendant obtained this writ of error, which was adjourned here for final decision.

Decision.—At the common law, this paper was not assignable; neither is it assignable under our statute. The plaintiff admits this; but claims to recover, on the ground, that being made payable to *bearer*, any person, who is the actual *bona fide* owner, may maintain the action as *bearer*. Were it a note for money, this position would be a correct one. But that doctrine has never been applied to executory contracts for the delivery of property, or for the performance of any particular act.

The case of *Geddings v. Byington*,² decided upon the circuit, at Ashtabula, is supposed to have settled this doctrine differently. This inference is deduced, not from the point de-

¹ This case is cited in Daniel on Negotiable Instruments, 55; Tiedeman on Commercial Paper, 29; Norton on Bills and Notes, 49. See also 14 Am. Dec., at 422, where the case is reported with extended notes.

² 2 Ohio, 228.

cided, but from some remarks of the judge in giving the opinion. These were only intended to apply to a note for the payment of money, made payable to a payee or bearer. It

General Rule.—It is the first and principal requisite that commercial contracts must be for the payment of money only, and such payment must be absolute and not contingent, either as to amount, event, fund or person; and if they are made payable in anything else, such as merchandise or other property susceptible of loss or variation in value, they will not be good commercial contracts, but of course will be sustained as common law contracts. Chitty on Bills, 153; Cook v. Satterlee, 6 Cow., 108; Worden v. Dodge, 4 Denio, 159; Archer v. Claflin, 31 Ill., 306; Tibbits v. Gerrish, 25 N. H., 41; Horton v. Arnold, 17 Wis., 139.

Exception.—May be Payable in Merchandise if at the Option of the Payee.—Neither will the contract be sustained as a commercial contract if it is payable in money *or* merchandise in the alternative, unless the option of accepting the money or merchandise is exclusively in the *holder*. Dan. on Negot. Inst., Sec. 55; Norton on Bills and Notes, Sec. 23; Auerbach v. Pritchett, 858 Ala. 451; Hosstatter v. Wilson, 36 Barl., 307; McClellan v. Coffins, 93 Ind., 456; Hodges v. Shuler, 22 N. Y., 114.

Exception.—Statutory Provisions.—By statute in some of the states; however, contracts to pay in property, to order, or to bearer, are made negotiable. Prather v. McEvoy, 8 Mo., 661; Hyland v. Blodgett, 9 Oregon, 166; Spears v. Bond, 79 Mo., 470; Weil v. Tyler, 38 Mo., 545; Rev. Stat. of Mo. (1879), Sec. 663; McClellan v. Coffin, 93 Ind., 456.

In Spears v. Bond, *supra*, the contract was as follows and was held to be a good promissory note under the statute:

“May 28, 1897,
“*Eighteen months after date, we, or either of us, promise to
pay to the bearer the sum of 20,000 feet of good salable lumber, for
value received of him.*

J. W. Fox,
^{his}
RILEY X BOND.”

mark.

According to the weight of authority a “promise to pay,” in goods and chattles, is nothing more than a special contract for the delivery of particular articles, and such contracts are not negotiable. Clark v. King, 2 Mass., 524; Auerbach v. Pritchett, 58 Ala., 451; Quinby v. Merritt, 11 Humph., 439; Roberts v. Smith, 58 Vt., 494 (where the promise was to pay “an ounce of gold,” and held not to be good); Jones v. State, 40 Ark., 347; Arnold v. Rock River Co., 5 Duer., 207; Gordon v. Rundlett, 29 N. H., 435; Sachett v. Palmer, 25 Barb., 179; Dilley v. Van Wie, 6 Wis., 209; Palmer v. Ward, 6 Gray, 340; McCartney v. Smalley, 11 Iowa, 85; Wright v. Hart, 45 Pa. St., 454; Phoenix Ins. Co. v. Allen, 11 Mich., 501; Marine Bank v. Rushmore, 28 Ill., 463; Henschel v. Mahler, 3

was only to that point that the attention of the court was directed in argument. The negotiable character of the note was not made a subject of inquiry by either party. The

Denio., 428; Martin v. Chauntry, 2 Strange, 1271; Digberty v. Damel, 5 Yerger, 451; Jerome v. Whitney, 7 Johnson, 321; Hasbrook v. Palmer, 2 McLean, 10; Butler v. Paine, 8 Minn., 324; Irwin v. Lowry, 14 Pet., 293; Lieber v. Goodrich, 5 Cow., 186; Shamokin Bank v. Street, 16 Ohio St., 1; Ellison v. Collinridge, 9 C. B., 570; Judah v. Harris, 19 Johns., 144; Pardee v. Fish, 60 N. Y., 265; Huse v. Hamblen, 29 Ia., 501; Lafayette Bank v. Ringel, 51 Ind., 393; Chrysler v. Renois, et al., 43 N. Y., 209; Thompson v. Sloan, 23 Wend., 71.

It is now well established that a Bill or Note, although possessing every other requisite of a negotiable instrument, is bad, if the order or *promise* be for *labor* or *merchandise*, and *not for money*.

The Reason for the Rule.—This requisite springs from the necessities of commercial intercourse. Money is the one standard of value, established by the law, recognized by the courts and demanded by the exigencies of trade and commerce. “All other commodities may rise and fall in value; but in theory, at least, money always measures this rise and fall, and remains the same.”

If the promise be to pay in wheat or corn, it is impossible to determine from an inspection of the instrument on any given day, what its value will be on the succeeding day. This uncertainty and hazard necessarily destroy its negotiability. Such an instrument would obviously be unfitted for a circulating medium. For this reason, “a note payable in neat cattle,” and a promise to pay “in a good horse, to be worth \$80.00, and goods out of a store amounting to \$20.00,” are each non-negotiable. Jerome v. Whitney, 7 Johns, 322; Thomas v. Roosa, 7 Johns, 461.

Money Defined.—The meaning of “money” as applied to negotiable instruments has been defined by the Acts of Congress known as the “Legal Tender Acts.” Whatever is legal tender is money. The legal tender qualities of the money ordered or promised at the place of payment of the bill or note determine whether the medium of payment specified is really legal tender or not. This test is not fixed and universal, however, “When by the statute of Victoria, ‘Canada Bills’ were made legal tender, the court of Upper Canada said: ‘It may be that a person can make a promissory note payable in a particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in “Canada Bills,” because they are not money or specie. They have no intrinsic value as coin has; they *represent only*, and are *signs* of value. Money itself is a commodity; it is not a sign; it is the thing signified.’” Gray v. Worden, U. C. Q. B., 535; Norton on Bills and Notes, 51.

To the general rule, however, there seems to be at least an

plaintiff in error, claimed a reversal, on the ground that the right of the original payee did not appear, by the declaration, to have passed to the holder, by assignment, delivery, or

apparent exception. A bill or note made payable in money of a foreign denomination is still negotiable. This arises from international recognition of standard or bullion value in moneys. Our courts, "Under the statutes of the United States, will take judicial notice of the fact that the value of foreign coin, as expressed in the money of account in the United States, shall be that of the pure metal of such coin of standard value; and that the value of the standard coin of the various nations of the world in circulation is estimated annually by the directors of the mint and proclaimed on the first day of January by the Secretary of the Treasury. These foreign denominations, therefore, can always be paid in our own coin of equivalent value to which it is always reduced on a recovery." 2 Chitty Bills (Am. edit.), 615-616. *Deberry v. Darnell*, 5 Yerg., 451.

When action is brought upon a bill or note, however, it is necessary to prove the value of the sum expressed in our own money, as the courts can construe the instrument payable in no other. *Thompson v. Sloan*, 23 Wend., 71; *Bayley on Bills*, 23.

Equivalent Words and Phrases for Money.—Descriptive terms prefaced to the word "money" have been held not to vitiate the instrument containing them. 21 Tex., 466; 38 Tex., 214,

In the first of these cases the descriptive words were, "other good cash notes"; in the second, "in good, solvent cash note." In each case the court held that the descriptive words did not vitiate the instrument.

The words "current funds" and "currency" have been held to mean "money"; but the question is in dispute.

Among others, the following cases hold the affirmative: *Emigrant Company v. Clarke*, 47 Ia., 671; *White v. Richmond*, 16 Ohio, 5; *Wood v. Price*, 46 Ill., 435.

To the contrary: *Nat. Bank v. Ringel*, 51 Ind., 393; *Johnson v. Henderson*, 76 N. Car., 227; *Haddock v. Woods*, 46 Ia., 433.

The rule under consideration forbids a promise to perform other acts in addition to the payment of money. The leading authority on this point is *Martin v. Chauntry*, 2 Strange, 1271. The language of the note was, "to deliver up horses and a wharf, and to pay money." This was held not to be a note within the Statute of Anne. Prof. Ames very clearly and concisely states the objections to such an instrument: "One could be indorsed, the other would have to be assigned. In some jurisdictions, the action could be brought by the indorsee in his own name, but as assignee, he could only sue in the name of his assignor. In the case of the negotiable instrument being in the hands of a *bona fide* holder, no

otherwise, and that ground being considered sufficient for the purpose, the judgment was reversed without further examination. In this case, the direct question is presented, whether

defense of fraud or latent equity would avail; in the case of holder as assignee, all would avail."

Contracts Payable in Bank Bills or Currency.—When we say that commercial contracts must be paid in "money," we mean that they must be paid in something which is tenderable for debt. Rev. St. U. S., Secs. 3584, 3590. Many expressions have been used which have been held to mean an order or promise to pay "money," such as the following: "in current funds of the State of Ohio"; "current bank notes of Cincinnati"; "currency of this place"; "in funds current in the City of New York"; "in current Ohio bank notes"; "current money of Alabama"; "in good current money of this state." Sweetland v. Creigh, 15 Ohio, 118; White v. Richmond, 16 Ohio, 5; Lacy v. Holbrook, 4 Ala., 18. When the medium is expressed to be "good current money" or "current money," it is not objectionable, as legal tender money is intended. See also Burton v. Brooks, 25 Ark., 215; Black v. Ward, 27 Mich., 191; Frank v. Wessels, 64 N. Y., 155; Warren v. Brown, 64 N. Car., 381; Swift v. Whitney, 20 Ill., 144; Phelps v. Town, 14 Mich., 374; Pardee v. Fish, 60 N. Y., 265; Sweetland v. Creigh, 15 Ohio, 118; White v. Richmond, 16 Ohio, 5; Howe v. Hartness, 11 Ohio St., 449; Jones v. Fales, 4 Mass., 245; Bull v. Kasson, 123 U. S., 112; Haddock v. Woods, 46 Ia., 435; Klauber v. Biggerstaff, 47 Wis., 551.

An Order or Promise to Pay in "Bills of Exchange" is not a Promise to Pay Money.—In the case of First Nat. Bk. of Brooklyn v. Slette 69 N. W. Rep., 1148, (Minn.), the promise was to pay "by New York or Chicago exchange," and the court said: "The holder of this instrument cannot demand in payment thereof — dollars in money; for the maker is not bound to discharge his obligation, except by means of inland bills of exchange on New York or Chicago. Nor can the maker tender in payment — dollars in money; for the promise is to make payment by inland bills, which he must purchase in the market. The instrument, then, is not payable in money, and is, therefore, not a promissory note within the law merchant." Easton v. Hyde, 13 Minn., 90; Jones v. Fales, 4 Mass., 245; Irvine v. Lowry, 14 Pet., 293; First Nat. Bk., &c., v. Greenville Nat. Bk., 84 Tex., 40.

Must be Payable in Money, but may be in the Money of any Country.—While commercial contracts must be payable in money, it is not necessary that the money should be that current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever. Story on Bills, Sec. 43; Dan. on Negot. Inst., Sec. 58. But when the contract is to be paid in the money of a foreign country, the specific denominations of the

such a contract as this can be so transferred as to authorize a third person to maintain a suit in his own name. Our unanimous opinion is that no such right can be transferred. The

money should be given so that the court may be able to ascertain its equivalent value. Dan. on Negot. Inst., Sec. 58.

In *Black v. Ward*, Campbell, J., said: "A note payable in Canada currency means no more and no less than that it is payable in Canada money at the Canada standard, and that it is governed as to the amount it calls for by the same rules as if it had been made in Canada, and payable in so many dollars without containing any further directions." 27 Mich., 193; 15 Am. R., 162. In New York, however, a note payable in "Canada money" was held not negotiable. In *Thompson v. Sloan*, Cowan, J., said: "A promissory note must, in order to be negotiable, be payable in money only, in current specie; or at least in what he can judicially notice as equivalent to money." 23 Wend., 71; 35 Am. D., 546. In this case, however, the court intimates that if the note had been made payable in pounds, shillings and pence, the exact amount might have been ascertained and been expressed in dollars and cents and would have been negotiable. *Thompson v. Sloan*, 23 Wend. The decision of *Thompson v. Sloan* was made in 1840, at a time when the "dollar" was not a denomination of the lawful money of Canada. But at the time when the case of *Black v. Ward* arose, this had been changed and the denomination of Canada money corresponded with that of the United States. Upon this theory these cases may be reconciled. The opinion of Cowan clearly indicates that if the money named in the note had been a denomination of Canada money, so that its equivalent could have been ascertained, his conclusion would have been different. A note payable in Mexican silver dollars has been held to be a good promissory note. The fact that a note is payable in the money of a foreign country does not destroy its negotiability nor divest it of any of the attributes of a promissory note; the recovery, however, must be limited thereon to its value in American money. *Hogue v. Williamson*, 85 Tex., 553; Am. St. R., 823. So also a negotiable contract may be payable in either gold or silver coin. *Strickland v. Holbrooke*, 75 Cal., 268.

The Amount Must not be Payable out of a Particular Fund.—Commercial contracts must not be made payable out of a particular fund. For that would make their payment depending upon the existence or supply of the fund, and therefore conditional. *Worden v. Dodge*, 4 Denio., 159; *Richardson v. Carpenter*, 46 N. Y., 661; *Ehricks v. De Mill*, 75 N. Y., 370; *Turner v. P. & S. Ry. Co.*, 95 Ill., 134; *Corbet v. Clarke*, 45 Wis., 403.

The Amount May be Charged to a Particular Fund.—If, however, the amount to be paid is to be credited to some particular fund; or if the person who is to pay the amount is

judgment must be reversed, and judgment be given for the defendant.

referred to some fund from which he may reimburse himself, the contract will be sustained. *Spurgin v. McPheeters*, 42 Ind., 527; *Munger v. Shannon*, 61 N. Y., 258; *Macleod v. Luce*, 2 Strange, 762; *Turner v. P. & S. Ry. Co.*, 95 Ill., 133; *Brill v. Tuttle*, 81 N. Y., 457; *Union Trust Co. v. Chicago & R. R. Co.*, 7 Fed. R., 513; *Kelly v. Brookland*, 4 Hill, 263.

It Must not be for the Payment of Money and an Act.—The bill or note must be for the payment of money only. If it contains an order or promise to pay money, and also to do some other act, this will destroy it as a negotiable contract. In the case of *Martin v. Chauntry* (2 Strange, 1271), the order was “to pay money at a particular day and to deliver up a horse and a wharf,” and it was held not to be a negotiable contract. In *Cook v. Satterlee* (6 Cow., 108), the order was “to pay money and take up a certain outstanding note” which was held bad. See also *Ayrey v. Fearnside*, 4 M. & W., 168; *Gillilan v. Myers*, 31 Ill., 525; *Fletcher v. Thompson*, 55, N. H., 208; *Wright v. Travers*, 73 Mich., 484; *Wise v. Charlton*, 4 A. & E., 786; *Follett v. Moore*, 4 Ex., 416; *Davies v. Wilkinson*, 10 A. & E., 98; *Overton v. Tyler*, 4 Barr, 346; *Arnold v. The Rock River Ry. Co. v. Smith*, 5 Duer, 207; *Hodges v. Shuler*, 22 N. Y., 114; *Owen v. Barnum*, 7 Ill., 461; *Hosstatter v. Wilson*, 36 Barb., 307; *Cate v. Patterson*, 25 Mich., 191; *Preston v. Whitney*, 23 Mich., 260; *Zimmerman v. Anderson*, 67 Pa. St. 421; *Fancourt v. Thorne*, 9 A. & E. (58, E. C. L.), 312.

SECTION 16.

THE ORDER AND THE PROMISE MUST BE FOR THE PAYMENT OF A CERTAIN AMOUNT OF MONEY.

SMITH v. NIGHTINGALE.¹

IN THE KING'S BENCH, AT NISI PRIUS (TRINITY TERM), JUNE 11, 1818.

[*Reported in 2 Starkie, 375, also in 3 English Common Law Reports 452.*]

This was an action by the plaintiffs in right of the wife, as administratrix of James Eastling.

Form of Action.—The declaration contained a count upon a promissory note alleged to have been made by the defendant, on the 12th of October, 1807, for the payment of 64l to James Eastling, payable three months after the date:

¹This case is cited in Story on Bills of Ex., Sec. 42; Chitty on Bills, 133, 145, 160; Tiedeman on Negotiable Paper, 28; Daniel on Negotiable Instruments, 53; Randolph on Commercial Paper, 134, 320; Wood's Byles on B. & N., 136; Norton on Bills & N., 55; Ames on B. & N., 73; Benjamin's Chalmers Bills, Notes and Checks, 17.

By the rule that the amount must be certain is meant that the instrument must specify exactly the amount of money intended to be paid. The rule of construction is, however: "*Id certum est quod certum reddi protest.*" Indefiniteness or uncertainty will not vitiate the instrument if a simple mathematical calculation will reduce it to certainty.

The leading case upon the subject is Smith v. Nightingale, *supra*. In this case, the writing purported to pay 65 pounds "*and also all other sums which may be due.*" Lord Ellenborough declared that the promise was neither definite, single, nor distinct; that reference must be had to books before the amount specified could be ascertained, and for this reason was void as a note.

For the reasons above stated, the courts have held that in all such cases as a promise to pay 13 pounds "*and all fines according to rule*"; "*whatever sums you may collect*"; or "*the demands of a sick club,*" the instrument must be denied negotiability. This result does not follow, however, when the instrument contains such terms as "with interest," "with current exchange," etc. Johnson v. Frisbie, 15 Mich., 286.

Not only must commercial contracts be made payable in money, but the amount to be paid must be certain and stated in the body of the contract. If the amount can be ascertained upon the face of the contract, it will be sufficient; but if reference must be made to other papers or accounts in order to ascertain the

the declaration contained also the money counts, and a count upon an account stated.

It appeared that Eastling had been employed by the defendant as a servant in husbandry, and that the defendant having in his hands monies belonging to James Eastling, gave

amount, the contract will not be sustained as a commercial contract. Consequently a note which promises to pay without naming the amount, but where the amount is given in the margin, the same will be sustained. *Strickland v. Holbrooke*, 75 Cal., 269.

If the note provides for a specified sum of money, and also for the payment of something else, the value of which is not ascertained: but depends upon extrinsic evidence, it will not be sustained. *Lowe v. Bliss*, 24 Ill., 168; *Houghton v. Francis*, 29 Ill., 244; *Laird v. Warren*, 92 Ill., 204.

Provision for the Payment of Attorney's Fees.—The fact that it contains a provision for the payment of interest without naming the amount of interest will not render it uncertain in amount, for the legal rate will be collected. Upon the question whether a condition to pay "collection or attorney's fee" in addition to the amount named affects the negotiability of these contracts or not, there is much conflict of authority. Some of the states have sustained the negotiability of these instruments; others have held that the condition destroys the negotiability of the instrument; while still others have held that the stipulation renders the contract void. A careful examination of all the authorities, especially of the more recent decisions, will show that the weight of authority is found in favor of the doctrine that the negotiability of a commercial contract is in no way affected by a stipulation for the payment of reasonable collection or attorney's fee. In the following states commercial contracts are sustained where such stipulation is added: Oregon, Arkansas, Mississippi, Minnesota, Iowa, Louisiana, Kansas, Illinois, Dakota, Nebraska, as well as by the courts of the United States. *Benn v. Kutzschan*, 24 Or., 28; 32 Pac. R., 763; *Overton v. Mathews*, 35 Ark., 147; *Meacham v. Pinson*, 60 Miss., 226; *Hamilton Gin Co. v. Sinker*, 74 Tex., 52; *Dietrich v. Bayhi*, 23 La. An., 767; *Harris Mnfg. Co. v. Anfinson*, 31 Minn., 182; *Schlesinger v. Arline*, 31 Federal Rep., 648; *Farmers' Nat. Bk. v. Sutton & Co.*, Fed. R., 191; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scoville*, 18 Kan., 433; *Hurd v. Dubuque Bk.*, 8 Neb., 10. The attention of the student is called to the case of *Bowie v. Hall*, 1 L. R. A., 546; also 69 Md., 433.

In the following states the contracts containing such stipulations have been sustained but are not negotiable. They may be enforced as common law contracts. Pennsylvania, Missouri, North Carolina, Minnesota, Wisconsin, California and Maryland. They are denied negotiability upon the ground that the amount to be paid is uncertain. *Johnson v. Speer*, 92 Pa. St., 227; *First*

him the following promise in writing, upon which the first count in the declaration was founded:

"October, 12, 1807.

"I promise to pay to James Eastling, my head carter, the sum of 65l, with lawful interest for the same, three months after date, and also all other sums which may be due to him."

Contention of Defendant.—On the part of the defendant it was objected, that this instrument could not be consid-

Nat. Bk. v. Gay, 63 Mo., 33; First Nat. Bk. v. Bynum, 84 N. Carolina, 24; Jones v. Raditz, 27 Minn., 240; Savings Bank v. Strother, 28 S. C., 504; Adams v. Seaman, 82 Cal., 637; First Nat. Bk. v. Larsen, 60 Wis., 211; Maryland & Co. v. Newman, 60 Md., 584; 45 Am. R., 750.

While in the following cases the courts have held that such stipulations are absolutely void: Bullock v. Taylor, 39 Mich., 138; Myer v. Hart, 40 Mich., 517; Wright v. Travers, 73 Mich., 494; Altman v. Rellershofer, 68 Mich., 287; Tinsley v. Hoskins, 111 N. C., 340; Gaar v. Louisville Banking Co., 11 Bush (Ky.), 182; Kemp v. Claus, 8 Neb., 24; State v. Taylor, 10 Ohio, 378; Walker v. Woolen, 54 Ind., 163; Maynard v. Mier, 85 Ind., 317.

Statutory Provisions.—In Indiana it has been provided by statute "that any and all agreements to pay attorney's fee depending upon any condition therein set forth and made part of any bill of exchange acceptance, draft, promissory note or other written evidence of indebtedness are hereby declared illegal and void." It has been held, however, that if the amount of fees are stipulated and unconditional, that the stipulation would be sustained. Maxwell v. Morehart, 66 Ind., 301.

Mr. Daniel, in his valuable work on Negotiable Instruments, says: "It seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency, because when they cease to be current they contain a stipulation to defray the expense of collection." So far from tending to check the circulation of these contracts, such a provision, it would seem in business circles, adds to its value, and thus renders it more available for commercial purposes. Stapleton v. Louisville Banking Co., 95 Georgia, 802; Montgomery v. Crossthwait, 90 Ala., 553; 24 Am. St. Rep., 832.

There are at least four distinct holdings by our courts upon the effect of a stipulation to pay "collections or attorney fees":

1st, That the stipulation is valid and enforceable (1 Daniel Neg. Inst., 4th ed. sec. 62, Montgomery v. Crossthwait, 90 Ala., 553; 24 Am. St. Rep., 832; Benn v. Kutzschan, 24 Oregon, 28; Dorsey v. Wolf, 142 Ill., 589);

ered as a promissory note, since it was not made for the payment of any certain sum, and that it could not be given in evidence under the count upon an account stated, since it was an agreement, and for a larger sum than 20*l.*, and ought to be stamped.

Contention of Plaintiff.—The plaintiff, contended that it was certain to the extent of 65*l.* and therefore that to that extent the plaintiff was entitled to consider it as a promissory note; but that, at all events, it was evidence of an account

2nd, That the stipulation is valid, but such instruments are not negotiable—simply common law contracts, (*Johnson v. Spear*, 92 Pa. St., 227; *First Nat. Bk. v. Larsen*, 60 Wis., 206; *Bowie v. Hall*, 69 Md., 434; *Bank v. Wheeler*, 75 Ill., 546; *Adams v. Seaman*, 82 Cal., 637);

3d, That the *stipulation* is void, and therefore does not affect the contract (*Gaar v. Louisville Bk. Co.*, 11 Bush (Ky.), 182; *Gilmore v. Hirst*, 56 Kans., 626); and

4th, Where such stipulation renders the transaction usurious, and therefore subject to the operation of the statutes against usury (*Dow v. Updike*, 11 Neb., 95; 7 N. W. Ref., 185; *State v. Taylor*, 10 Ohio, 378).

Payment of an Amount Certain “with Exchange.”—Some of the courts have held, where the negotiable contract provides for the payment of “current exchange,” that the addition of these words destroys the negotiable character of the contract. *Read v. McNulty*, 12 Rich., 445; *Lowe v. Bliss*, 24 Ill., 168; *Hill v. Todd*, 29 Ill., 103; *Clanser v. Stone*, 29 Ill., 116, where these words were treated as surplusage. *Bank v. Strother*, 28 S. C., 504. While the above rule seems to have the best reason to support it, the weight of authority in this country seems to be in favor of supporting these contracts as negotiable instruments. *Smith v. Kendall*, 9 Mich., 241; *Bullock v. Taylor*, 39 Mich., 137; *Legett v. Jones*, 10 Wis., 34; *Hill v. Todd*, supra; *Saxton v. Stevenson*, 23 Up. Can. C. P., 503; *Sperry v. Horr*, 32 Iowa, 184; *Hastings v. Thompson*, 54 Minn., 184; 55 N. W. Rep., 968; *Johnson’s Cases on B. & N.*, 33; *Morgan v. Edwards*, 53 Wis., 599; 11 N. W. Rep., 21. In the case of *Hastings v. Thompson*, supra, Mitchell, J., in discussing this rule, said: “We have found no English cases directly in point, and none bearing on the question, except *Pollard v. Harries* (3 Bos. & P., 335), where such an instrument (one payable “with current exchange”) was declared on as a promissory note. We have been unable to find that the supreme court of the U. S., or either Massachusetts, New York or Pennsylvania, have ever passed upon the question. Now, we think we are safe in saying, and justified in taking notice of the fact, that if

stated, and that no stamp was essential to a mere acknowledgment of a debt.

Decision.—Lord Ellenborough was of opinion, that the instrument was too indefinite to be considered as a promissory note: it contained a promise to pay interest for a sum not specified, and not otherwise ascertained than by reference to defendant's books; and that since the whole constituted one entire promise, it could not be divided into parts. He also held, that since the instrument contained an agreement to pay the money, it could not be received in evidence as an acknowledgment without a stamp.

The plaintiff was non-suited.

bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as such, the answer would, in almost every instance, be unhesitatingly in the affirmative." Tied. on Com. Paper, Sec. 28a; Rand. Com. Paper, Sec. 200; Churchman v. Martin, 54 Ind., 380; Dodge v. Emerson, 34 Me., 96; Smith v. Marland, 59 Ia., 645.

The Amount Should be Expressly Stated.—The amount to be paid should be stated with great caution in the body of the instrument. It is sometimes expressed also in figures, in the upper left hand corner of the contract, as well as in the body, for greater caution. If the sum in figures, on the superscription, differs from the sum written in the body of the instrument, the latter will control, and parol evidence is not admissible for the purpose of showing that the sum intended was not that stated in words in the body of the instrument, but was stated in figures in the margin. Sanderson v. Piper, 5 Bing., 425; Norwich Bank v. Hyde, 13 Conn., 281, 282; Master v. Miller, 4 Term R., 320.

The Amount, When Certain.—The General Rule.—The amount of the contract is certain even though it is to be paid (1) with interest, or (2) by installments, or (Cooke v. Horn, 29 Law Times, 369; Riker v. Sprague Manufacturing Co., 14 R. I., 402), (3) with a provision that upon default in payment of any installment or interest the whole shall become due, or (Riker v. Sprague Manufacturing Co., supra; Carlon v. Kenealy, 12 Mes. & Wel., 139; Oridge v. Sherborne, 11 M. & W., 374; Chicago Ry. Co. v. Merchants' Bk., 136 U. S., 268; Wilson v. Campbell, 68 N. W. Rep., 278), (4) with exchange, or (Hastings v. Thompson, 54 Minn., 184; Tiedeman Com. Paper, Sec. 28a; Daniel Neg. Inst., Sec. 54), (5) with costs of collection or attorney's fees (see cases supra).

SECTION 17.

THE ORDER AND THE PROMISE MUST BE TO PAY AT
SOME TIME CERTAIN.COLEHAN v. COOKE.¹

IN THE COMMON PLEAS, HILARY TERM (16 GEO. 2), FEB. 10TH, 1742.

[*Reported in Willes's Reports, 393.*]

Form of Action.—*The first count* is on a promissory note dated 27th of May 1732, whereby the defendant promised to pay to Henry Delany or order 150 guineas ten days after the death of his father John Cooke for value received; which note after the death of the father (which is laid to be the 2d of April 1741) was duly indorsed by Delany to the plaintiff. *The second count* is on a promissory note dated the 15th of July 1732, whereby the defendant promised to pay to Henry Delany or order six weeks after the death of his father 50 guineas for value received; the like indorsement laid after the death of the father as before. *The third count* is for money had and received etc., 250*l.*; but this is out of the case. The damage is laid at 300*l.*; and a general verdict for the plaintiff on both notes.

Contention of Defendant.—It was insisted (*a*)² on for the defendant in arrest of judgment that these notes are not within the stat. 3 and 4 Anne c. 9;³ and if not that they are not indorsable, or assignable, and consequently that the plaintiff who brings this action as indorsee cannot recover at law.

To show that these notes are not within the statute a great many things were said on the argument of the case, and a great many cases and authorities cited both out of the com-

¹ This case is cited in Story on Bills of Exchange, 46, 47; Chitty on Bills, 128, 135, 136, 137, 144, 150, 517, 520; Daniel on Negotiable Instruments, 46; Wood's Byles on Bills and Notes, 146, 170; Tiedeman on Negotiable paper, 25; Ames on Bills and Notes, 83; Benjamin's Chalmers, Bills Notes and Checks, 26, 28, 65, 276; Randolph on Commercial Paper, 146; Norton on Bills and Notes, 39

² This case was several times argued.

³ A promissory note payable to A. or order after the death of B. is assignable under the stat. 3 and 4 An. c. 9; and consequently the indorsee may maintain an action upon it against the maker.

mon and civil law books. But I think that all the objections that were made may be reduced to these two general positions:—

1st. That the act of Parliament only intended to put promissory notes on the same footing as bills of exchange; and that therefore, if bills of exchange drawn in this manner would not be good and consequently not assignable, it follows that notes drawn in this manner are not made indorsable or assignable by the statute.

2nd. That the act was made for the advancement of trade and commerce, and consequently was intended to extend only to such notes as are in their nature negotiable, and that these notes are not so.

Before I consider these objections, I will state the words of the act of parliament on which the question must depend, 3 and 4 An. c. 9, entitled “*An act for giving like remedy on promissory notes as is now used on bills of exchange, and for the better payment of inland bills of exchange.*” “Whereas it hath been held that notes in writing signed by the party who makes the same, whereby such person promises to pay to any other person or his order any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchants, and that any person to whom such note shall be assigned, indorsed or made payable could not within the said custom maintain any action on such note against the person who first drew and signed the same, therefore to the intent to encourage trade and commerce which will be much advanced if such notes shall have the same effect as inland bills of exchange and shall be negotiated in like manner, be it enacted that all notes in writing which shall after, etc., be made and signed by any person or persons, etc., whereby such person or persons do or shall promise to pay to any other person or persons, etc., his, her or their order or unto the bearer any sum of money mentioned in such note shall be taken and construed by virtue thereof due and payable to any such person or persons, etc., to whom the same is made payable, and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the cus-

tom of merchants; and that the person or persons, etc., to whom the sum of money is made payable by such note shall and may maintain an action for the same in such manner as he, she or they may do upon any inland bill of exchange, etc., and that the person or persons, etc., to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her or their action for such money either against the person or persons who signed such note, or against any of the persons who indorsed the same, in like manner as in case of inland bills of exchange." The title of the act seems to refer to bills of exchange, and they are likewise referred to in the preamble, and the remedy is to be the same.¹ But in the description of the notes which are to be made assignable there is no reference to bills of exchange; but the words are very general, and I never understood that the plain words of an enacting clause are to be restrained by the title or preamble of an act.² It has indeed been often said, and I think very rightly, that if the words of an act of parliament be doubtful, it may be proper to have recourse to the preamble to find out the meaning of the legislature: but where the words of the enacting part are plain and express, I do not think that they ought to be restrained by the preamble; for the preamble may only recite some particular mischiefs which have happened, but the enacting clause may not only

¹ It was taken for granted in *Tindal v. Brown*, 1 D. and E., 167; 2 D. and E., 186; both in the court of King's Bench and in the Exchequer Chamber, and solemnly decided in the cases of *Brown v. Harraden*, *ib.* 4 vol., 148, and *Smith v. Kendal*, *ib.* 6 vol. 123 (in which the dictum of Denison J. in *Dexlaux v. Hood*, Bull N. P., 274, and the determination of *May v. Cooper*, Fost., 376, to the contrary were over-ruled), that three days' grace are allowed on a promissory note (though it be a note payable to A. without adding "or to his order, or to bearer." *Smith v. Kendal*, 6 D. and E., 123.) as well as on a bill of exchange, by reason of the stat. 3 and 4 An. c., 9, which puts them both on the same footing in all respects.

² Vid *Copeman v. Gallant*, 1 P. Wms., 320; *Mace v. Cadell*, Cowp., 232; *Pattison v. Bankes*; *ib.*, 543; *Cox v. Liotard*, H. 24 Geo. Dougl., 167, n. (55), oct. ed.; and *Bradley v. Clarke*, per Buller J. 5 D. and E., 201.

be calculated to prevent these mischiefs but others also of a like nature. Now the words of the enacting part of this act are plain and clear and very general; and in order to bring a note within the description of that clause, it is only necessary,

1st, That the note should be in writing;

2d, That it should be made and signed by the person promising to pay; and

3rd, That there be an express promise to pay to another or his order or bearer. But as to the time of payment, the act is silent, nor is there any particular form prescribed.

And therefore, as to the first objection, that if a bill of exchange had been drawn in this manner it would not have been good; supposing it to be true, I do not think that it follows that these promissory notes may not be within the general words of the statute, if they answer all the descriptions therein contained. However for argument's sake I will suppose that this consequence would hold; but we do not think that a bill of exchange drawn in this manner would be bad. Upon this head it would be but mispending time to run over all the passages which have been cited out of the civil law books in relation to bills of exchange, because I put a question to the counsel which will, I think, determine this point, whether there is any limited time mentioned in any of the books beyond which if bills of exchange are made payable they are not good, and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. But if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill. There is but one passage in the books wherein any notion to the contrary is so much as hinted at; and that is in *Scacchius de commerciis*, where it is said that it had been *formerly* an objection against a bill of exchange, as contrary to the nature of it, that it was made payable at the end of seven months: but by his making use of the word *formerly*, it is plain that in his opinion the law was then held to be otherwise. If therefore the distance of time would not have made a bill of exchange bad if drawn in this manner, since it is drawn at a time that which must come, the only other objection that was made on this head was that in all bills of exchange there must be a

par pro pari, which there cannot be in this case, because the value cannot be ascertained. But I shall show plainly that the value may be ascertained, when I come to the objection that these are not negotiable notes.

Having answered the objections against these notes considering them on the same footing as bills of exchange, I come now to the second objection, arising from the words and intent of the statute. And first I think that they are plainly within the words. They are made in writing; they are signed by the person promising to pay, and there is an express promise to pay to another or his order; and as no time of payment is mentioned in the statute, the distance of time is no objection within the words of the act.

Let us see therefore in the next place whether any objection arises against them from the design and intent of the act; though I think it would be pretty hard to construe a note to be not within the intent of an act when it is manifestly within the words of it, and the words of the act are plain and express. When the words of an act are doubtful and uncertain, it is proper to inquire what was the intent of the legislature: but it is very dangerous for judges to launch out too far in searching into the intent of the legislature, when they have expressed themselves in plain and clear words. However we think that these notes are within the intent as well as the words of the act. And to show that they are so, I will here take notice of all the cases which were cited to the contrary, and will show that they all stand on a different footing and are plainly distinguishable from the present. For they are all of them cases where either the fund out of which the payment was to be made is uncertain, or the time of payment is uncertain and might or might not ever happen: whereas in the present case there is no pretence that the fund is uncertain, and the time of payment must come, because the father after whose death they are made payable must die one time or other. The case of *Pearson v. Garrett*,¹ was thus; the defendant gave a note *to pay 60 guineas when he married B.*, and judgment was given for the defendant, because it was

¹ 4 Mod. 242 and Comb. 227.

uncertain whether he would ever marry her or not, so the time of payment might never come. In the case of *Jocelyn v. Le Serre*,¹ the bill was drawn on Jocelyn *to pay so much every month out of his growing subsistence*; how long that would last no one could tell, or whether it would be sufficient for that purpose: and therefore the bill was holden not to be good, because the fund was uncertain. In the case of *Smith v. Boheme*,² the promise in the note was *to pay 70l. or surrender a person therein named*: if therefore he surrendered the person, there was no promise to pay anything, and therefore the note was uncertain and not negotiable. In the case of *Appleby v. Biddulph*,³ a promise *to pay if his brother did not pay by such a time*; held not to be within the statute, because it was uncertain whether the drawer of the note would ever be liable to pay or not. In the case of *Jenny v. Herle*,⁴ a promise *to pay such a sum out of the income of the Devonshire mines*, held not a promise within the statute, because it was uncertain whether the fund would be sufficient to pay it. So in the case of *Barnsley v. Baldwyn*, 14 Geo. 2 B. R.,⁵ the promise was, as in the case of *Peason v. Garrett*, *to pay such a sum on marriage*; and held not to be within the statute for the same reason. And as these notes are plainly not within the intent of the statute because not negotiable *ab initio*, so when the words themselves come to be considered they are not within the words of it, because the statute only extends to such notes where there is an *absolute promise* to pay and not a promise depending on a contingency, and where the money at the time of the giving of the note becomes *due and payable by virtue thereof* (so are the words of the statute), and not where it becomes *due and payable by virtue of a subsequent contingency* which may perhaps never happen, and then the money will never become payable

¹ Reported in 10 Mod. 294, and 316; and cited in 2 Ld. Raym. 1362, and in 8 Mod. 364.

² Cited in 2 Ld. Raym. 1362.

³ Cited in 8 Mod. 363.

⁴ Reported in 2 Ld. Raym. 1361.

⁵ Since reported in 7 Mod. 417 oct. ed., and in 2 Str. 1151, by the name of *Beardesley v. Baldwin*.

at all. And it can be said that there is a promise to pay money, or that money becomes due and payable by virtue of a note, when unless such subsequent contingency happen the drawer of the note does not promise to pay anything at all.¹

But the present notes, and those cases where such notes have been holden to be within the statute, do not depend on any such contingency; but there is a certain promise to pay at the time of the giving of the notes, and the money by virtue thereof will certainly become due and payable one time or other, though it is uncertain when that time will come. The bills therefore of exchange commonly called *Billæ nundinales* were always holden to be good, because though these fairs were not always holden at a certain time, yet it was certain that they would be held. The case of *Andrews v. Franklyn*,² depends on the same reason; for there the note was *to pay such a sum two months after such a ship was paid off*; and held good, because the ship would certainly be paid off one time or other. The case of *Lewis v. Ord*, was exactly the like case, and determined on the same reason. As to the same objection that these are not negotiable notes, because the value of them cannot be ascertained, the argument is not founded on fact, because the value of a life when the age of a person is known is as well settled as can be: and there are many printed books in which these calculations are made. But if it were otherwise, the life of a man may be insured, and by that the value will be ascertained. And the same answer will serve to the objection which I before mentioned against such bills of exchange.

There was another objection taken, that the drawer might have died before his father, and then these notes would have been of no value: but there is plainly nothing in this objection, for the same may be said of any note payable at a

¹ But there may be a *conditional acceptance* of a bill of exchange. *Smith v. Abbot*, 2 Str. 1152; *Julian v. Shobrooke*, 2 Wilf. 9; *Pierson v. Dunlop*, Cowp. 574; and *Sproat v. Matthews*, 1 D. and E. 182.

² 1 Str. 24.

³ T. 8 and 9 G. 2 B. R.; *Cunningh. Bills of Exchange* 113.

distant time, that the drawer may die, worth nothing before the note becomes payable.

We do not think that the averment of the death of the father before the indorsement makes any alteration, because we are of opinion that if the notes were not within the statute *ab initio*, they shall not be made so by any subsequent contingency. But for the reasons aforesaid we are of opinion (and so was the Ld. C. J. Baron Parker) that the plaintiff is entitled to his judgment,¹ and therefore the rule for arresting the judgment must be discharged."²

¹ This judgment was afterwards affirmed in the Court of King's Bench on a writ of error. 2 Str., 1217.

² See the following cases, in which the notes or bills of exchange (for they are both on the same footing) were holden not to be good notes or bills, because they were payable out of a particular fund or on a contingency: Banbury v. Lissett, 2 Str., 1211; Dawkes v. Ld. Deloraine, 2 Bl. Rep., 782; 3 Wils., 207; Roberts v. Peake, 1 Burr., 323; Kingston v. Long, M. 25 G., 3 B. R. Bayley's Bills of Exchange, 71; and Carlos v. Fancourt, 5 D. & E., 482. In these, the notes were holden to be good, because they were payable at all events: Burchell v. Burchell, 2 Ld. Raym., 1545; Evans v. Underwood, 1 Wils., 262; Poplewell v. Wilson, 1 Str., 264; Chadwick v. Allen, *ib.*, 607; Goss v. Nelson, 1 Burr., 226; and Haussoullier v. Hartsinck, 7 D. and E., 733.

The Exact Time Need Not be Stated.—It is not necessary that the instrument state upon its face the exact time in days, months and years; but it certainly loses its negotiable character, if it is impossible to extract from the note any statement of the time of its maturity. A case upon this subject is found in the First National Bank v. Beyman (84 N. Car., 125). In this case the note stated that payment might be demanded "at any time they (the payees) may deem this note insecure, even before the maturity of the same."

But it seldom happens that the courts find difficulty in applying this rule; for the most general and indefinite expression will be so construed as to sustain the note or bill. Thus "at sight," "on demand," means on showing and demanding payment of the instrument. Dixon v. Nuttall, 6 C. & P., 320.

"By Nov. 1" means on that date. Preston v. Dunham, 52 Ala., 217.

So literally is this rule construed that if absolutely nothing is said as to the maturity it is by legal construction payable on demand, and valid as a demand note. Salinas v. Wright, 11 Tex., 572; Porter v. Porter, 51 Me., 376; Pindar v. Barlow, 31 Ver., 529.

Lost Notes—When Due.—A lost note is presumed to have been payable on demand. *Tucker v. Tucker*, 119 Mass., 79.

But a post dated note silent as to maturity is not due until the date day. *Mohawk Bank v. Broderick*, 10 Wend., 304.

If the time of payment is expressed, it must be pleaded and proved; failure to do so is a fatal variance. *McCrary v. Newberry*, 25 Ill., 496.

Notes Payable on Demand.—When Due.—Bills and notes payable "on demand," are due immediately without grace, unless the rule has been changed by statute. *Palmer v. Palmer*, 36 Mich., 487; *Wheeler v. Wilson*, 47 N. Y., 519.

"When called for," "on request," "at such time as A. may need for her support," have been held by the courts to be equivalent to "on demand." *Bilderbeck v. Burlingame*, 27 Ill., 338; *Howland v. Edmonds*, 24 N. Y., 307; *Corbett v. Stonemetz*, 15 Wis., 187.

In a few cases, phrases seeming to give the debtor an option as to paying at all have been similarly construed. Thus "when both parties have agreed," "when convenient," "when my circumstances will admit," have all been held to be equivalent to "on demand after the expiration of a reasonable time." *Ramot v. Schotenfels*, 15 Ia., 457; *Works v. Hershey*, 35 Ia., 340; *Salinas v. Wright*, 11 Tex., 572.

It is not necessary to express the time of payment by date; a reference to any event, (as death), certain to occur, is enough. *Conn v. Thornton*, 46 Ala., 587.

Marriage, however, is insufficient as to date or time of payment, being too uncertain. *Beardsley v. Baldwin*, 2 Stra., 1151.

And the same is true of a person coming of age, for he may die a minor. *Goss v. Nelson*, 1 Burr, 226.

Payment by installments does not invalidate a note; and a proviso that the whole note shall fall due upon the maker's failure to pay a single installment is valid. *German Mut. Ins. Co. v. Franck*, 22 Ind., 364.

Payable in Installments.—A negotiable contract may be payable in installments, and the fact that it contains a provision whereby the whole amount shall become due and payable on failure of payment of one installment, does not render the time of payment uncertain. *Carlton v. Kenealy*, 12 M. & W., 139; *Oridge v. Sherborne*, 11 M. & W. 374; *Miller v. Biddle*, 13 Law Times, R. (N. S.) 334; *Marrett v. Eq. Ins. Co.*, 54 Me., 537; *Wright v. Irwin*, 33 Mich., 32; *White v. Smith*, 77 Ill., 351; *Crossmore v. Page*, 73 Cal., 213; *Palmer v. Ward*, 6 Gray, 340. The time of payment of each installment must be fixed and certain. *Moffat v. Edwards*, 1 Car. & M., 16. A note payable in installments is overdue, when the first installment is overdue and unpaid, so that a purchaser thereafter may be charged with equities. *Hart v. Stickney*, 41 Wis. 630; *Vinton v. King*, 4 Allen,

562; Field v. Tibbetts, 57 Me., 359. The fact that interest simply is overdue and unpaid, is not sufficient to charge a purchaser thereafter with existing equities. Kelly v. Whitney, 45 Wis., 110; National Bank v. Kirby, 108 Mass., 497; Cromwell v. County of Sac, 96 U. S., —; Railway Co. v. Sprague, 103 U. S., 762; McLane v. Sacramento, etc., Ry. Co., 66 Cal., 606; see notes to 30 Am. Rep., 702, 703.

Days of Grace.—Days of grace are a certain number of days, generally three, allowed to the maker or acceptor of a bill, draft, or note, in which to make payment, after the expiration of the time expressed in the contract itself. These days were originally granted as a matter of favor to the debtor, but it finally became an established custom among merchants, and was given the force of law by the courts and in some cases by statute, so that they are now, in many jurisdictions, demandable as of right. The number of these days varies in different jurisdictions, from three in the different States in the Union, Great Britain and Ireland to thirty in Genoa. Days of grace have been abolished in many of the States. See statutes of your State. Wiffen v. Roberts, 1 Esp., 261; for a history of “days of grace,” see Trask v. Martin, 1 E. D. Smith, 506.

What Instruments are Entitled to Grace?—Days of grace are allowed upon both promissory notes and bills of exchange. It may be stated that they are allowed upon all instruments (unless abolished by statute) except those payable “on demand.” They are allowed upon the contract whether it be payable on a certain event, at a certain day, at a certain number of days, weeks, months or years after date, or after or at sight. If the contract is payable in installments, each installment is entitled to grace. Brown v. Harraden, 4 Tenn. Rep., 148; Griffin v. Goff, 12 Johns, 423; Pridge v. Sherborne, 11 M. & W., 374; Macloon v. Smith, 49 Wis., 200; 5 N. W. Rep., 336.

Where Grace is Allowed.—When Must Payment be Demanded.—Where grace is allowed, demand of payment before the last day of grace would be premature; but in order to bind persons whose liability is conditional, the demand *must* be made on the last day of grace. Donegan v. Wood, 49 Ala., 242; Pratt v. Eads, 1 Blackf. (Ind.), 82; Bussard v. Levering, 6 Wheaton, 102. Protest may and should be made on the last day of grace; but an action upon the contract cannot be commenced on the last day of grace, for the reason that the debtor has all of that day (during business hours) upon which to make payment. Estes v. Tower, 102 Mass., 65; Gordon v. Parmelee, 15 Gray, 413.

Checks Not Entitled to Grace.—Checks are not entitled to grace for the reason that they are payable “on demand.” Andrews et al. v. Blackly et al., 11 Ohio St., 89; Morrison v. Bailey, 5 Ohio St., 13; Champion v. Gordon, 70 Pa. St., 476; Wood River Bank v. First National Bank, 36 Neb., 744; 55 N. W. Rep. 239.

Grace May Be Dispensed With.—The parties may, by a stipulation in the contract, dispense with “grace.” *Perkins v. Bank*, 21 Pick., 483; *Duruford v. Patterson*, 7 Marh. (La.), 460; *Bell v. First N. Bank*, 111 U. S., 382.

Where a Negotiable Contract Falls Due on a Holiday —When Should Payment be Demanded?—Where a negotiable contract matures on a holiday, if it is entitled to grace, it is legally due on the day next preceeding and if that is also a legal holiday then on the next preceeding; but if it is not entitled to grace, then it is legally due on the day next subsequent. To illustrate: If a promissory note, payable “at sight or a certain time after date,” falls due (last day of grace) on a Sunday, it is due and payable on the Saturday next preceding, and if that is also a legal holiday, then on Friday; but if it is payable “on demand” and it falls due on a Sunday, it is not legally due until the Monday following. *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex., 452; 18 S. W. Rep., 743; *Avery v. Stewart*, 2 Conn., 69; 7 Am. Dec., 250; *Salter v. Burt*, 20 Wend., 205; *Barrett v. Allen*, 10 Ohio, 426; *Kuntz v. Temple*, 48 Mo., 75; *Morris v. Richards*, 45 Law T. R., 210.

What Days are Holidays?—The question of what are legal “holidays” is one to which reference must be had to the statutes and decisions of the various states for answer. The following days are almost universally regarded as holidays: Christmas, New Year’s Day, Labor Day, the 4th of July, the 22d of February, and the days observed according to religious customs or usages. Within the past few years many of the states have provided by statute that each Saturday afternoon shall constitute a legal holiday.

Where no Time is Stated.—Commercial contracts are usually made payable at a specified time after date, or after sight or at sight. If no time for payment is specified, they are payable immediately upon demand. *Convers v. Johnson*, 146 Mass., 22; *Dan. on Negot. Inst.*, Sec. 88; *Bank v. Price*, 52 Ia., 570; *Jones v. Brown*, 11 Ohio St., 601; *Palmer v. Palmer*, 36 Mich., 487; *Keyes v. Fenstermaker*, 24 Col., 329; *Libbey v. Mikeborg*, 28 Minn., 38; *Wheeler v. Warner*, 47 N. Y., 519; *Jackett v. Spencer*; 29 Barb., 180; *Meador v. Dollar Savings Bank*, 56 Ga., 605; *In re King’s Estate*, 94 Mich., 411, 425; 54 N. W. Rep., 178; *Hitchings v. Edmands*, 133 Mass., 338; *Ferns v. Gay*, 146 Mass., 118; 15 N. E. Rep., 87; *McMullen v. Rafferty*, 89 N. Y., 456; *Hall v. Toby*, 110 Pa. St., 318.

Where Interest is Provided for.—The fact that the note provides for the payment of interest where no time of payment is stated, does not raise a presumption that it was not to be paid immediately. *Norton v. Ellam*, 2 M. & W., 461; *Barrough v. White*, 4 B. & C., 327; 3 L. J. Rep., K. B., 227; *Hanes v. Kerrison*, 2 Taunton, 323; *Mitchell v. Easton*, 37 Minn., 335; *Schreiber v.*

Richmond, 73 Wis., 12; Wilks v. Robinson, 3 Rich. (S. C.), 102; Wheeler v. Warner, 47 N. Y., 519; Hill v. Henry, 17 Ohio St., 9; Dunkle v. Nichols, 101 Ind., 474.

Payable "On or Before" a Day Named.—A negotiable contract payable "on or before" a day named is certain as to the time of payment. It is true that the maker may pay sooner if he shall choose; but this option if exercised would make the payment before the legal liability to pay arises and nothing more. If a time of payment is fixed once certain, it is no objection that by some possibility it may be paid and discharged sooner. *Mattison v. Marks*, 31 Mich., 421; *Smith v. Ellis*, 29 Me., 422; *Jordon v. Tate*, 19 Ohio St., 586; *Cisue v. Chidester*, 85 Ill., 523; *Noll v. Smith*, 64 Ind., 511; *Ernst v. Steckman*, 74 Pa. St., 13; *Conn v. Thornton*, 46 Ala., 587 (where the promise was "One day after date, I promise to pay, or at my death," etc.); *Stevens v. Blunt*, 7 Mass., 240; *Capron v. Capron*, 44 Vt., 410; *White v. Smith*, 77 Ill., 351; *Stillwell v. Craig*, 58 Mo., 24; *Stulls v. Silva*, 119 Mass., 137; *Cota v. Buck*, 7 Metc., 588; *Brooks v. Hargreaves*, 21 Mich., 254.

Time of Payment Depending Upon an Event Certain to Pass.—They may be payable at some uncertain time, for instance upon the happening of some event, providing that event is sure to happen. They may be made payable after the death of a particular person; for that event is sure to happen. But to make them payable when a particular person arrives at his majority, or when he marries, would be bad on the ground of uncertainty of time, for the reason that either event may never happen. They may be made payable, however, at the "convenience" of the maker; or when the payor and payee mutually agree; or at the convenience of the maker upon the express condition that he is to be sole judge of what shall be a convenient time. *Page v. Cooke*, 164 Mass., 116; *Smithers v. Junker*, 41 Fed. R., 101; *Capron v. Capron*, 44 Vt., 412; *Crooker v. Holmes*, 65 Me., 195; *Works v. Hershey*, 35 Ia., 340; *Lewis v. Tippon*, 10 Ohio St., 88; *Garrigus v. Hone & Society*, 3 Ind. App., 91; *Carnwright v. Gray*, 127 N. Y., 92.

It has been held that a promise to pay "After my death, date, etc," is certain as to time and becomes due at once after the death of the maker. *Shaw v. Camp*, 160 Ill., 425.

A note payable "twenty-four" after date, etc., is not void for uncertainty of time, nor a note on demand; but payable some time after date. Such a note is evidently payable at some time after the date, either days, months or years. In a case like the above where the time of payment has been omitted by mistake, the holder may insert the time intended. *Coles v. Hulme*, 15 Com. L. R., 300; *Waugh v. Russell*, 1 Marshall, where the word "hundred" was supplied by the holder where it had been omitted by mistake, to render the amount certain; *Loyd v. Lord*, 1 Bro. Par. Cas., 379, where the name of one of the parties was supplied; *Boyd v. Broth-*

erson, 10 Wend., 93, where a note which was intended to be for "eight hundred dollars," the words "hundreds" and "dollars" were omitted, and consequently the holder inserted these words; Conner v. Routh, 12 How. (N. Y.), 176.

Time—Computation of.—In computing the time when a commercial contract which is payable after date, or so many days "after sight" or demand, or after a particular event, the day of the date is always excluded. Avery v. Stewart, 2 Conn., 69. To illustrate: A note dated Jan. 1st, due thirty days after date, allowing grace, would fall due Feb. 3d. By excluding the 1st day of January, the day of its date, it would be "*nominally due*" on the 31st day of January, that being the thirtieth day, and "*legally due*" three days thereafter, or the 3d day of February. If a note is dated Feb. 1st, due in thirty days after date, excluding the day of the date it would be *nominally due* the 3d day of March, and *legally due* the 6th day of March. In a leap year, however, the same note would be legally due on March 5th. When a commercial contract is to run for a certain number of days, the actual number of days are counted, excluding the day of the date. If the contract is made payable a month or a certain number of months after date, the time is computed by counting from the day of the date to the corresponding day of the month in which the contract matures. To illustrate: If a note is dated Jan. 1st, due one month after date, it is *nominally due* on Feb. 1st, and *legally due* due on Feb. 4th. And, if a note should be dated on the 29th of February in a leap year, due one month after date, it would be *nominally due* on the 29th of March and *legally due* on the 1st day of April. Seaton v. Hinneman, 50 Ia., 395; Roehner v. Knickerbocker Ins. Co., 63 N. Y., 160; Story on Bills, sec. 330; Story on Notes, see 213a; Ogden v. Saunders, 12 Wheaton, 213; Bayley on Bills, ch. 7; Chitty on Bills, ch. 9; Fisher v. State Bank, 7 Black., 610; Ammidown v. Woodman, 31 Me., 580; Ripley v. Greenleaf, 2 Verm., 129; Coleman v. Sayer, 1 Barn., 303; Taylor v. Jacoby, 2 Pa. St., 495.

If a note is dated on the 31st day of July, due in one month, it will be *nominally due* Aug. 31st; but if it is dated Aug. 31st, due in thirty days, it will be *dominally due* on Sept. 30th. Wagner v. Kenner, 2 Robinson (La.), 120; Wood v. Mullen, 3 Robinson (La.), 299.

If a bill is payable five days after sight and is accepted on the 1st day of the month, it is legally due the 9th. Mitchell v. Degrand, 1 Mason, 176.

Time—How Computed when Measured from an Act.—Some of the courts have held that when a computation of time is to be made from an act to be done, the day in which the act is done must be included. Rex v. Adderley, 2 Doug., 463, 464.

But this rule has been rejected in the later cases. Lester v. Garland, 15 Ves., 248.

So that now the day of the date as well as the act is excluded. *Bemis v. Leonard*, 118 Mass., 502; *Webb v. Fairman*, 3 M. & W., 473, where the earlier cases are critically reviewed.

It may be stated as a general rule that where a power may be exercised up to and including a certain day of the month and that day is Sunday, it may be exercised on the following Monday. *Street v. United States*, 133 U. S., 299; *Sands v. Lyon*, 18 Conn., 18.

And this is the general rule also in the performance of all common law contracts. *Salter v. Burt*, 20 Wend., 205; *Avery v. Stewart*, 2 Conn., 69; *Hammond v. American Mut. Life Ins. Co.*, 10 Gray, 307, where the payment of a premium on an insurance policy which fell due on Sunday was permitted to be made on Monday. When the time to file a pleading expires on a Sunday the same may be done on the next day. *Cox v. Bunn*, 6 Johnson, 326; *Borst v. Griffin*, 5 Wend., 84. If, however, the time within which an act is to be performed is fixed by statute, the general weight of authority is, that if the last day falls on Sunday, the time cannot be extended and the act must be performed on the day before. *Caupfield v. Cook*, 92 Mich., 626; *Simonson v. Durffy*, 50 Mich., 81; *Harrison v. Sager*, 27 Mich., 476, where it is held that a justice of the peace could not render judgment on the fifth day after the trial where the statute required that the judgment should be rendered within four days, the fourth being Sunday; *Brown v. Vailes*, 14 L. R. A. 120.

SECTION 18.

THE PARTIES* TO A NEGOTIABLE CONTRACT MUST BE CERTAIN AND DEFINITE.McCALL v. TAYLOR.¹

IN THE COMMON PLEAS, MAY 26, 1865.

[*Reported in 19 Common Bench, 301; 115 Eng. C. L., 301, also in 34 Law Journal (N. S.) Common Law, 365; 34 Law Journal (O. S.) 365.*]

Form of Action.—This was an action upon an instrument in the following form, which was declared on as a bill of exchange and also as a prommissory note:

“£300.00. [No date.]
“Four months after date, pay to my order the sum of
Three hundred pounds, for value received.
“To Captain Taylor, [No drawer's name.]
“Ship Jasper.”

Across this document was written, in the handwriting of the defendant, the words “Accepted, William Taylor.”

There was also a count for goods sold and delivered, and the ordinary pleas.

The cause was tried before Byles, J., at the sittings at

¹ This case is cited in Wood's Byles on Bills and Notes, pp. 156, 162; Daniel on Negotiable Instruments, sec. 92; Benjamin's Chalmers Bills, Notes and Checks, p. 4; Norton on Bills and Notes, p. 60; Tiedeman on Commercial Paper, sec. 34; Edwards on Commercial Paper, pp. 62, 290.

***Parties to Bills of Exchange—How Designated.**—The parties to a bill of exchange may be divided into:—

(a) Original, and

(b) Subsequent.

The original parties are:—

(a) The drawer who executes and delivers the instrument.

(b) The drawee, the person upon whom the order is given, and who is expected finally to pay the money called for therein.

(c) The payee, the person to whom the order is delivered and in whose favor it is executed.

These three persons so designated may be the same person in fact, that is, a bill may be drawn by a party upon himself payable to himself.

Guild-hall after the last Hilary Term. The plaintiff was a ship-chandler and provision-merchant. The defendant was the captain (and it was suggested owner also) of the ship *Jasper*. It appeared that the plaintiff had, in September, 1862, pursuant to orders received through one Milne, the ship's broker, delivered goods to the amount of 299*l.* 19*s.* 2*d.* on board that vessel for San Francisco, and had received in payment a bill at six months accepted by one Bailey, which bill was not paid at maturity; and that the instrument declared on was given to the plaintiff by Milne about six months afterwards. It also appeared that Bailey had been debited for the goods in the plaintiff's books, and that an invoice had been delivered charging Bailey as the debtor. There was no

The subsequent parties are:—

- (a) The acceptor who is the drawee after acceptance;
- (b) Endorsers or subsequent transferers.
- (c) Endorsees or subsequent transferees or holders.

The holder is the person who has possession of the instrument, and who by the law merchant is entitled to the payment of the bill.

Of course a bill may be drawn by two or more persons made payable to two or more persons and directed to two or more persons. They may also be payable to a person or to his order or to bearer.

Parties to Promissory Notes—How Designated.—

The parties to a promissory note may be divided into two classes:—

- (a) Original.
- (b) Subsequent.

The original parties to a promissory note are:—

(a) The maker, or the person who executes and delivers the contract.

(b) The payee or the person to whom the contract is executed and delivered and made payable.

The subsequent parties are:

- (a) Endorsers or transferers.
- (b) Transferees or holders.

Parties to Checks—How Designated.—The parties to checks are designated exactly as the parties to bills of exchange, viz.: drawers, payees, and drawees. Checks are not usually presented for acceptance, therefore there is no acceptor, but checks being negotiable instruments there may be endorsers and endorsees. The nature and liability of the respective parties to these various instruments will be discussed in the subsequent sections of this work.

evidence whatever to show that the defendant had any interest in the goods.

Contention of Plaintiff.—The learned Judge intimating a pretty strong opinion that the instrument in question was not a bill of exchange, it was submitted by the plaintiff that it was a promissory note, for which reliance was placed on *Cruchley v. Clarence*.¹

Contention of Defendant.—On the part of the defendant it was insisted that the instrument declared on was not a bill of exchange, being wanting in that which is essential to constitute a bill of exchange, viz., a drawer and a payee; and, further, that it was not either in form or in substance a promissory note—referring to *Stoessiger v. The South Eastern Railway Company*.²

Upon the count for goods sold and delivered, the learned Judge left it to the jury to say upon whose credit the goods were delivered on board the *Jasper*—that of the defendant, or of *Bailey*—reserving for the court the question whether the instrument could properly be declared on either as a bill of exchange or as a promissory note. The jury returned a verdict for the defendant.³

Hannen, in Easter term last, pursuant to the leave reserved, obtained a rule nisi to enter a verdict for the plaintiff, on the ground that the document declared on was a promissory note. He referred to *Cruchley v. Clarence*,⁴ and *Armfield v. Allport*.⁵ He submitted, that, though informal,

¹ 2 Maule & Selw. 90 (1813).

² 3 Ellis & B. 549 (E. C. L. R. vol. 77); 23 Law J. Q. B., 293.

³ In the course of the discussion at the trial, the learned Judge adverted to a case in this court, the name of which he could not at the moment remember. It was probably *Brown v. De Winton*, 6 C. B., 336 (E. C. L. R. vol 60). It was there held, that, although no precise form of words is necessary to constitute a promissory note, still it ought to have all the essentials of a contract. Thus, a note payable to the maker's *own order*, is not per se a negotiable instrument within the 3 & 4 Anne, c. 9, s. 1; a payee must be expressly named, or must appear by necessary implication. But, when a note in that form is indorsed in blank, and put in circulation by the maker, it becomes in effect payable to the bearer.

⁴ 2 Maule & Selw. 90. (1813).

⁵ 27 Law J. Exch. 42.

it might, like a document drawn in favor of a fictitious payee, be treated as a promissory note payable to bearer.

Argument of Counsel for Defendant.—The goods for which the instrument was given were not delivered to the defendant, but to another person, and the plaintiff's journal and ledger, and also the invoice delivered of the goods, all show that the defendant was not the person to be charged: there is no reason, therefore, why the court should exercise any astuteness in favor of the plaintiff. The simple question is, *whether the instrument amounts to a promissory note*. It is submitted that it clearly does not. So far as it professes anything, it professes to be a bill of exchange wanting the name of a drawer. It is addressed to the defendant, and is accepted by him. The words "pay to my order" cannot mean the order of the defendant. In truth, it is an incomplete bill of exchange, and nothing else. The defendant does not promise to pay any sum on the demand of any person, or at any particular time; and there is no endorsement. [Willes, J.—The document seems sufficiently to explain itself. It is an authority to some person to put his name to it as drawer. No one has done so. It is therefore not a complete instrument. Byles, J.—My strong impression at the trial was, that it was neither a bill of exchange nor a note, but I thought it better to reserve the point.] *Stoessiger v. The Great Eastern Railway Company*¹ is precisely in point. There, a parcel delivered to a railway company for carriage contained 9*l.* 10*s.* in cash and an instrument bearing a bill of exchange stamp, in the following terms, "*Thrre months after date pay to me the sum of 11*l.* 10*s.*, value received. To Mr. Cruttenden,*" etc.: and written across it was *an acceptance by Mr. Cruttenden*. The parcel was addressed to Goold, a creditor of Cruttenden; and the intention was that Goold should put his name to the instrument as drawer. In the course of transmission the parcel was opened, and the instrument and what it contained were abstracted. In an action against the company for the loss, it was held

¹ 3 Ellis & B. 549 (E. C. L. R. vol. 77); 23 Law J. Q. B., 293.

that the instrument was a "writing," and not a "bill, note, or security for money," within the meaning of the Carriers Act;¹ but that it could not be considered of value, so as under that section to exempt the company from their common-law liability as carriers. Ld. Campbell, in giving judgment, says: "I am clearly of opinion that it is not a bill of exchange, for it has neither drawer nor payee; and it is not a promissory note, because it does not contain a promise to pay any one, and it is entirely inconsistent with Cruttenden's intention that any person who got possession of it should put his name to it as drawer." The rest of the court agree that the instrument was neither a bill nor a note: and Erle, J., says, "This was an instrument in an imperfect state." It is utterly impossible to distinguish that from the present case.

Argument of Counsel for Plaintiff.—Though imperfect as a bill of exchange, this instrument may well have effect given to it as a promissory note, as it must have been intended by the party to be, viz., an engagement to pay the amount to a bona fide holder on demand. The plaintiff might have put his name to it as drawer; and, if he had done so, the defendant would have had no answer. That is clear from *Cruchley v. Clarence*,² *Crutchley v. Mann*,³ and numerous other cases. It is the same thing (as LeBlanc, J., observes in the former case), as if the defendant (the acceptor) had made the bill payable to bearer. [Byles, J.—What was wanting in *Cruchley v. Clarence* is present here; the marginal note is equivocal.] The name of the person sued is there: and it is held that he gives authority to any one who is a bona fide holder, to fill up the blank. "As the defendant has chosen," says Ld. Ellenborough, "to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill." It is upon the same principle that a bill drawn in favor of a fictitious payee may be

¹ 11 G. 4 & 1 W. 4, c. 68, s. 1.

² 2 Maule & Selw. 90 (1890).

³ 5 Taunt. 529 (E. C. L. R. vol. 1); 1 Marsh. 29 (E. C. L. vol. 4).

declared on as a bill payable to bearer. In *Fielder v. Marshall*,¹ an instrument purporting on the face of it to be a bill of exchange drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of a claim for rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of *the payee* were inserted. The whole instrument (except the drawer's name) was in the handwriting of B. It was held that the payee was entitled to recover upon it as a promissory note of B. [Byles, J.—The address in the corner was treated as no address at all. The instrument could not be a bill of exchange. It could only be Marshall's promissory note. The court construed it so as to give effect to the obvious intention of the parties. Montague Smith, J.—There were both maker and payee named there.] There cannot be any difference in principle between a blank left for the name of a drawer, and a blank for the payee, or, which is the same thing, a fictitious payee. Erle, C. J., in that case says: "It appears to me that the right way to deal with it is this, to treat the direction to 'Mrs. Emma Fielder' at the foot of the bill as a mere informal repetition of the words in the body of it, 'pay to Mrs. Emma Fielder.' The effect of so constructing it is, that the defendant, who accepts the bill, thereby promises to pay the amount at maturity to Emma Fielder. Feeling that we are at liberty so to construe the instrument, I have much satisfaction in giving effect to what must have been the intention of the parties, by holding that the plaintiff is entitled to recover." In the course of the argument, Willes, J., referred to a case of *Miller v. Thompson*,² where it was held that an instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branch banks, by order of the directors, might be declared upon as a promissory note; Tindal, C. J., in giving judgment, says: "It appears that the directors for whom the instrument in question purports to be drawn by their manager, are members of the company whose name and character are presented

¹ 9 C. B. N. S. 606 (E. C. L. R. vol. 99).

² 3 M. & G. 576 (E. C. L. R. vol. 42), 4 Scott N. R. 204.

on the face of it, and that the company is not a corporation, but a mere private association. We must, therefore, look upon it as an instrument drawn by one of several members of a firm, purporting that the sum therein mentioned shall be paid by the firm at a given time and place. In effect it is a promissory note, and nothing else. To constitute a bill of exchange, it is essential that there should be two parties, a drawer, and a person upon whom the bill is drawn.¹ I am clearly of opinion that this is a promissory note." And the learned Judge (Willes, J.) adds, "If there be sufficient on the face of the instrument to indicate a promise to pay, it is a promissory note. In *Peto v. Reynolds*,² the plaintiff's agent at Cameroons, in Africa, drew an instrument in the form of a bill of exchange; but addressed to no one; across which the defendant's agent wrote an acceptance in the defendant's name, and delivered the bill to the plaintiff's agent, for value received. In an action on the bill, the plaintiff attempted to prove that the bill was presented to the defendant, when he promised to pay it. It being doubtful, however, from the evidence, whether the defendant had made an absolute or merely a conditional promise to pay the bill, the court, in granting a new trial; though disposed to think that the instrument was not a bill of exchange, declined to give an express opinion on the point; but it was held by Parke, B., Alderson, B., and Martin, B., that if the instrument was not a bill of exchange, *it was clearly a promissory note*, if there was evidence of an absolute promise to pay it. In *Armfield v. Allport*,³ the circumstances were very similar to those of the present case. It was there held that an instrument drawn in the form of a bill payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared on by the endorsee as a promissory note made by the drawer and en-

¹ And a person to whom the money is to be paid.

² 9 Exch. 410.

³ 27 Law, J., Exch. 42.

dorsed by the drawee.¹ In Byles on Bills,² it is said: "If the bill be not made payable either to any payee in particular, or to the drawer's order, or to bearer in general, it would seem, according to the opinion of the majority of the judges,³ to be payable to bearer; but, according to the opinion of Eyre, C. J., in the same case, it is mere waste paper": and reference is made to Rex v. Randall,⁴ where a bill "payable to — or order" was held *not* to be a bill of exchange, because there was no payee; and to Rex v. Richards,⁵ where the prisoner drew a bill upon the treasurer of the navy "payable to — or order," and signed it in the name of a navy surgeon, and it was held, that, to constitute an order for the payment of money, there must be some payee, and that a direction "to pay to — or order was not sufficient."

Decision of Court.—I am of opinion that this rule should be discharged. The instrument in question is declared upon as a bill of exchange, and also as a promissory note. It was in this form, "*Four months after date, pay to my order the sum of three hundred pounds, for value received,*" and it was addressed to the defendant, *but it had no date and no drawer's name.* Across it was written an acceptance by the defendant.

The question is, whether the holder of this document has a right to declare on it either as a bill of exchange or as a promissory note. *It is clearly not a bill of exchange, and in form it is not a promissory note.* If I could be clearly satisfied that I should be giving effect to the intention of the parties by holding this instrument to be a promissory note, I would endeavor so to construe it. But I am aware of no

¹ It is not easy to discover what was decided by this case. In a considered judgment, the Ld. Chief Baron is reported to have said: "A man who writes his name across a stamped paper *as acceptor*, there being a direction to him upon the paper, is liable; he gives his authority *to anybody* to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose."

² 8th edit. 73.

³ In *Minet v. Gibson*, 1 A. Bl. 608.

⁴ Russ C. C. 185.

⁵ R. & R. C. C. 193.

case, and the industry of the learned counsel has discovered none, which warrants us in holding this to be either the one or the other. It is an inchoate and imperfect instrument. If the holder had authority to make it a complete instrument either as a bill or a note, he was at liberty to do so; but, if he had no such authority, he might if he attempted to do so

¹ 3 Ellis & B. 549 (E. C. L. R. vol. 77); 23 Law J., Q. B. 293.

The meaning of the word "parties" in reference to negotiable instruments is used in a more restricted sense than when relating to "parties" to an ordinary contract. In the latter case, "parties" are those who in a strict legal sense are affected by the operation of the contract; in the former case, "parties" as the courts usually designate them are those whose names appear on the face or back of the instrument. "A person is made a party by his signing, his signature or some other written emblem upon the instrument that he intends to be bound by the instrument. A signature in pencil, a signature made by another person, but attested by a mark, an indorsement upon the back of the note in form of '7, 2, 8,' made with the intention of indorsing, or such evidences of intention. The question is whether the signer intended to bind himself or not." Norton on Bills and Notes, 38. *Brayley v. Kelley*, 25 Minn., 160.

Certainty as to Parties is Promoted by Two Facts:—

(1) That the instrument bears upon its face means of identifying the parties to it;

(2) That these parties are capable of exact ascertainment.

The absence of either or both of these requirements renders the instrument non-negotiable.

Chief Baron Eyre, in *Gibson v. Minet*, declared: "If I put in writing these words: 'I promise to pay 500 pounds on demand, value received' without saying to whom it is waste paper. If I direct another to pay 500 pounds at some day after date, for value received, without saying to whom, it is waste paper."

This is necessary to the negotiability of the instrument. For, under the law merchant, a negotiable instrument must show upon its face by inspection who the parties are, except when made payable to bearer.

This then is the general rule, that without a maker or drawer, a drawee or a payee the instrument is non negotiable.

Exception in the Case of the Drawee.—The following exceptions may be noted in the case of the drawee:

(1) If the drawee can be otherwise sufficiently identified from the bill it is sufficient.

(2) An unaddressed bill accepted or a bill accepted where the drawer and acceptor are one and the same person, probably is

render himself liable to a charge of forgery. The case of *Stoessiger v. The South Eastern Railway Company*¹ seems to me to be precisely in point, without going into any of the other cases. Nothing is clearer to my mind than that, in the ordinary case of an acceptance with the drawer's name in blank, it is important, in order to constitute a contract, that

to be treated as a promissory note, and is negotiable. Norton on Bills and Notes, 57.

The Common Rules Concerning the Nomination of Payees may be Stated as Follows:—

(1) The payee of an instrument, except one payable to bearer, must be a person in being, natural or legal, and ascertained, at the time of issue.

(2) Where the payee and maker or drawer are the same person, the instrument is not issued until after its indorsement and delivery by the maker.

(3) The payee may be a fictitious or non-existing person, but the instrument is then construed as payable to bearer, and title thereto is made by estoppel." Norton on Bills and Notes; 57.

The parties to commercial contracts must be particularly described and must be a person or persons who are capable of being ascertained at the time the instrument is made. Chitty on Bills, 156. But the parties may be made certain without inserting their names; for that is certain which may be rendered certain; and if the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs the contract will be sustained. *Adams v. King*, 16 Ill., 169. The following contracts have been held to be sufficient as to parties: "Pay to bills payable," (signed) E. F.; "I promise to pay to you," (signed) X. Chalmers on Bills and Notes, 7; "Pay to the administrators of Abner Chase, deceased," (signed) C. D. *Adams v. King*, 16 Ill., 169; or a promise to pay to "A or heirs," (signed) H. B. *Knight v. Jones*, 21 Mich. 161. Where a note reads, "We promise to pay to the order of myself, etc.," extrinsic evidence is competent to show which of the two obligors was intended as the payee. *Jenkins v. Bass*, 88 Ky., 397. In the case of *Stoessiger v. The Southeastern Ry. Co.* supra, (23 Law J. [N. S.] [Q. B.] 293), the following instrument:

"Three months after date pay to me the sum of eleven pounds, ten shillings, value received."

"To Mr. Cruttenden, Jeweller."

"[Not signed.]"

"Accepted, Cruttenden."

Was held not to be a negotiable contract. *Ld. Campbell, C. J.*, said: "I am clearly of opinion, that it is not a bill of exchange, for it has neither drawer nor payee; and it is not a promissory note,

it should be known who is to be the drawer. It may have been important here that the instrument should be filled up as a bill drawn by the owner of the ship or the broker upon the captain. And it may be that the plaintiff had no authority to add his name as the drawer. But, whatever may have been the particular circumstances under which this document was

because it does not contain a promise to pay any one, and it is entirely inconsistent with Cruttenden's intention that any person who got possession of it should put his name to it as drawer." *Schultz v. Astley*, 2 Bing., 544; 5 Law J. Rep. (N. S.) C. P., 130; *Miller v. Race*, 1 Burr. 452; *Petilton v. Lorden*, 86 Ill., 361; *Gray v. Milner*, 8 Taunton, 739; *Shuttleworth v. Stephens*, 1 Camp. R., 407; *Harvey v. Kay*, 9 B. and C., 364; *Edis v. Bury*, 6 B. and C., 433; *Tevis v. Young*, 1 Metc. (Ky.), 197; *Allan v. Mawson*, 4 Camp, 115.

In the case of *Brown v. Gilman*, 13 Mass., 158, the following instrument was held not to be a good promissory note for the reason that all the parties were not certain:

" *Boston, 15th May, 1810.*

" *Good for one hundred and twenty-six dollars on demand.*

" *Gilman & Hoyt.*"

In this case Parker, C. J., said, "It is not a negotiable promissory note. It is not a note payable to bearer. Its legal effect is nothing more than that of a memorandum between the parties to it, to operate as a promise to pay money; as a receipt for money; or as proof of a sum of money to be accounted for, according to the real intention of the parties." See also, *Adams v. King*, 16 Ill., 169; *Carpenter v. Farnsworth*, 106 Mass., 561; *Yates v. Nash*, 29 L. J., C. P., 306; 8 C. B., 581 (98 E. C. L. Rep.)

It Is Sufficient to Describe the Parties.—It is sufficient if the parties are particularly described. They need not be named. *Storm v. Sterling*, 3 E. and B., 832 (77 E. C. L. R.); *Cowie v. Stirling*, 6 E. and B., 333 (88 E. C. L. R.)

If a note gets into the hands of a wrong payee, of the same name, he cannot acquire a title thereto; and if he indorses it he will be guilty of forgery. *Mead v. Young*, 4 Term, R. 28; *Foster v. Shattuck*, 2 N. H., 446. So also if a note is given to one in a name different from his own, he may declare upon it and prove that he was the person intended. *Patterson v. Graves*, 5 Blackf. (Ind.), 593; *Jester v. Hopper*, 8 Eng. (Ark.), 43. If the name is misspelled, parole evidence is admissible to show who was intended. *Willis v. Barrett*, 2 Stark., 29 (3 E. C. L. R.). A note payable to B. or C. will be bad for uncertainty of parties. *Blankenhagen v. Blundell*, 2 B. and Al., 417. Where the father and son have the same name it will be intended payable to the father

given, I act upon the case I have referred to. As it stands, the thing is inchoate and incomplete, and affords no foundation for the holder to sue upon it.

Willes, J.—I am entirely of the same opinion.

Byles, J.—I am of the same opinion. I thought at the trial, and still think, that the instrument in question could not

until the contrary is shown. *Sweeting v. Barrett*, 1 Stark, 106. A note may be payable to "the trustees of A's will" and parol evidence is admissible to show who the trustees are. *Adams v. King*, 16 Ill., 169; *Meggison v. Harper*, 2 C. and M., 322. So also may a negotiable contract "be payable to the administrator of A's estate." *Moody v. Threlkeld*, 13 Ga., 56. The following is a good negotiable contract: "On demand I promise to pay 'A,' 'B.' and 'C.,' or to their order, or the major part of them, the sum of 100 pounds." *Watson v. Evans*, 32 D. J. R. Exch., 137. If the name be left blank, a *bona fide* holder may fill it up with his own name. *Crutchly v. Mann*, 5 Taunton, 529. In *Grant v. Vaughn*, the contract was payable to "ship Fortune or bearer," and it was held to be a good negotiable contract payable to "bearer" simply. 3 Burr., 1516.

In the case of *Knight v. Jones*, 21 Mich., 161, the court held the following instrument to be a promissory note.

" *Detroit, Oct. 7, 1867.*

" I promise to pay to Mary Knight or heirs, the sum making four hundred and fifty dollars, on the first day of January, 1868.

" William Jones."

See also, *Armstrong v. Harshman*, 61 Ind., 52; *Sittig v. Birckstack*, 38 Md., 158.

Where a negotiable contract is issued in blank without the name of the payee there is an authority to a *bona fide* holder to insert a name. *Crutchley v. Clarence*, 2 M. and S., 90; *Crutchly v. Mann*, 5 Taunton, 529; *Atwood v. Griffin*, 2 C. & P., 368; *Rich v. Starbuck*, 51 Ind., 87. A promise "to pay to the order of the indorser's name," etc., was supported. 2 Hill, (N. Y.), 154; *Kayser v. Hall*, 85 Ill., 511; 118 Mass., 439. A promise "to pay to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being," etc., was held good. *Holmes v. Jaques*, 1 Q. B. L. R., 376; *Storm v. Stirling*, 3 E. and B., 842; 23 L. J. R. (Q. B.), 301; *Harlow v. Roswell*, 15 Ill., 56; *Watson, etc. v. Evans*, 1 Hurl. and C., 662; 7 E. and B., 234; *Adams v. King*, 16 Ill., 169; *Moore v. Anderson*, 8 Ind., 18; *Robertson v. Sheward*, 1 M. & G., 511; *Meggison v. Harper*, 2 Cr. and M., 322. In *Bowles v. Lambeth*, 54 Ill., 237, a note payable "to the estate of A.," was also held good. *Tittle v. Thomas*, 30 Miss., 122; *Lyon v. Marshall*, 11 Barb., 241.

be declared on as either a bill of exchange or a promissory note. It is not like a bill accepted in blank.

Montague Smith, J.—I also think this case is not distinguishable from *Stoessiger v. The South Eastern Railway*

Parties—Capacity of, to make Negotiable Contracts.—The general principles which govern the capacity of parties to common law contracts control in their application to the law of commercial contracts. Want of capacity says Mr. Randolph in his valuable work on commercial paper may be either natural, legal or political, according as it proceeds from mental unfitness or from the requirements of local or public law. Examples of natural capacity are found in idiots, lunatics and all persons of unsound mind or insufficient understanding. Among those who are legally incapable may be mentioned infants, married women and corporations so far as their power is restricted by law. Among those who are politically incapable may be mentioned alien enemies and to a certain extent public officers and State and municipal governments.

Infants—Capacity of.—Persons under twenty-one years of age are minors, or infants, and contracts made by them may be void, when they are clearly to the infant's disadvantage, or voidable which may or may not be to his advantage according to the circumstances, or they may be valid if entered into for the necessities of the infant or in satisfaction for his torts. The distinction between void and voidable contracts of infants is practically obsolete; so that now all the contracts of an infant, which are not in themselves illegal are voidable only and may be ratified.

Chancellor Kent in his Commentaries says, "it is held that a negotiable note given by an infant, even for necessities, is void, and his acceptance of a bill of exchange is void; and a bond with a penalty though given for necessities is void. It must be admitted, however, that the tendency of modern decisions is in favor of a reasonableness and policy of a very liberal extension of the rule, and that the acts and contracts of infants should be deemed voidable only, and subject to their election, when they become of age, either to affirm or disallow them. If their contracts were absolutely void it would follow as a consequence that the contracts could have no legal effect whatever. 2 Kent. Comm. Lect. 31; *Harner v. Dipple*, 31 O. St., 72.

Liability of Infant for Necessaries.—The rule is well settled that an infant may bind himself by a negotiable contract for necessities. *Bradley v. Pratt*, 23 Vt., 378.

He can not, however, bind himself for necessities when he has a parent or guardian who supplies his wants unless he has authority from such guardian or parent to purchase them and bind himself for them. *King v. Cole*, Holt's Rep., 360; *Coan v.*

Company *supra*. There, upon an instrument precisely similar to this, except that there it was dated, *Ld. Campbell* says: "It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be bearer; that *Cruttenden* should become liable

Boroles, ib., 358; *Thompson v. Leach, ib.*, 357; 3 *Mod. R.*, 301; 3 *Salk.*, 196; *Angell v. McClellan*, 16 *Mass.*, 228; *Rundell v. Keeler*, 7 *Watts*, 237. If an infant borrows money for necessities and gives his note for the same he is not liable on such note unless he applies the money accordingly. 3 *Salk.*, 196.

Liability of Infant for Torts.—Infants are liable for their torts and injuries of a private nature, and for wrongs committed by them the same as adults. If the tort be committed by force the infant is liable at any age; for in case of civil injuries, with force, the intention is not regarded. *Tift v. Tift*, 4 *Denio*, 175; *Bradley v. Pratt*, 23 *Vt.*, 378.

The law makes him liable for his tort, and if he elects to settle or liquidate such liability by giving his promissory note or other commercial contract, we see no reason why he should not be held liable in an action upon the note, to the same extent that he would be if the action had been brought upon the cause of action which formed the consideration for the note. The commercial contracts having been given in settlement of a claim for which the infant was liable and no fraud or imposition having been practiced in obtaining it the plea of infancy is certainly not available to defeat it.

Infant as Payee.—An infant, says *Mr. Daniel*, may undoubtedly be the payee of a bill or note, and may sue upon and enforce it, since it can not be but for his benefit if the consideration thereof does not move from himself, but from some third person, or if it be for a debt justly due to him. But whether or not an infant can personally receive payment is a different question. As a general rule, payment should be made to his guardian, and if it be made to the infant personally, and is thereby dissipated and lost, the payor would not be discharged. *Story on Bills*, Sec. 85; *Dan. on Negot. Inst.*, Sec. 227; *Phillips v. Paget*, 2 *Ark.*, 80.

Infant as Indorser.—An infant may also become the indorser of a commercial contract made payable to him or order and thereby pass the legal and equitable title so as to enable the endorsee to recover against prior parties. This is upon the theory that the prior parties by undertaking to pay to an infant or his order are estopped to deny his capacity to order payment to be made to the endorsee. *Story on Bills*, Sec. 85; *Hardy v. Waters*, 38 *Me.*, 450; *Dan. on Negot. Inst.*, Sec. 227. "It would be absurd to allow one who has made a promise to pay one who is an

generally to the bearer, was quite contrary to his intention." So here, I think we should be going entirely against the intention of the defendant if we were to hold him liable upon this instrument as upon a promissory note payable to bearer.

infant, or his order, to refuse to pay the money to whom the infant has ordered it to be paid, in direct violation of his promise." *Nightingale v. Withington*, 15 Mass., 272.

Liability of Infant Upon His Indorsement.—An infant, as an indorser is no more liable than as maker or acceptor of commercial contracts. While his indorsement operates to transfer the title to the contract he is not liable thereon. He may indeed disaffirm the contract of indorsement and intercept the payment to the endorsee. Or he may by giving notice to the antecedent parties of his avoidance of the contract of indorsement furnish them with a valid defense against the claim of the endorsee. But until he does avoid the indorsement it is to be deemed, as to such antecedent parties, a good and valid transfer. *Story on Notes*, Sec. 80.

Infants' Liability—Ratification.—Since the commercial contract of an infant is not absolutely void but voidable only, he may ratify it after reaching full age, when he will be bound to pay the instrument according to its term. For by ratification he validates the contract and it becomes the same as if it had been executed and delivered by an adult. The ratification enures to the benefit of all subsequent parties or holders.

No particular form of words is necessary to a ratification. A mere recognition of the existence of the debt or contract is sufficient. The following statements have been held to amount to a ratification by the infant after reaching full age: "I will pay the note as soon as I can make it, but not this year; all that is justly your due shall be paid; I owe you and will pay you when I return; I will remit in a short time." The promise to pay the contract to amount to a ratification must be direct and certain and must be made to the party with whom he contracted or his authorized agent; if made to a third person it will not be sufficient. Mere part payment by the infant, before maturity, will not of itself amount to a ratification by the infant after reaching his majority. *Smith v. Mayo*, 9 Mass., 62; *Robbins v. Eaton*, 10 N. H., 561.

In many of the states statutes have been enacted which provide that no action shall be maintained whereby to charge any person, upon any promise made after full age; to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the parties to be charged therewith.

RULE. Discharged.

Joint Note of an Infant and Adult.—If an infant executes a negotiable contract jointly with an adult, the latter will be bound by his contract and suit may be brought against the adult alone. *Taylor v. Dansby*, 42 Mich., 84; *Reading v. Beardsley*, 41 Mich., 123; *Burgess v. Merrill*, 4 Taunton, 468; *Slocum v. Hooker*, 12 Barb., 563.

Joint Note of Infant Partner.—The same rule applies to infant partners. And the fact that an infant remains in the firm after he reaches his majority does not necessarily ratify his contracts. *Crabtree v. May*, 1 B. Mon., 289; *Bush v. Linthicum*, 59 Md. 344; *Adams v. Beal*, 67 Md., 53; *Osburn v. Farr*, 42 Mich., 134; *Continental Bank v. Strauss*, 137 N. Y., 148, 553; *Mehlhop v. Rea*, 90 Iowa, 30; 57 N. W. Rep., 650; *Bixler v. Kresge*, 169 Pa. St., 405; 47 Am. St. Rep., 920; *Shirk v. Shultz*, 113 Ind., 571. His interest in the partnership property remains liable, however, to the partnership debts. *Lovell v. Beauchamp*, 19 Appeal Cases (L. R.), 607; *In re Howes*, 3 Q. B., 628; *In re Taylor*, 8 D. M. and G., 254; *Ex parte Adam*, 1 V. and B., 494; *Ex parte Blain*, 12 Ch. D., 522; *Ex parte Henderson*, 4 Ves., 163; *Shirk v. Shultz*, *supra*; *Yates v. Lyon*, 61 N. Y., 344, *Pelletier v. Conture*, 148 Mass., 269. Neither can the adult members of the firm repudiate these contracts upon the ground of infancy, for by admitting the infant to the firm they have thereby made him their agent. *Adams v. Beal*, 67 Md., 53; *Am. St. Rep.*, 379; *Sparman v. Keim*, 83 N. Y., 245.

Lunatics—Capacity to Contract—Effect of Insanity.—It may be stated as a general rule, that where contracts are made with imbeciles or lunatics in ignorance of their weaknesses and no advantage is taken of them and the acts are in good faith in every respect, they are valid and binding upon the lunatic. *Molton v. Cameroux*, 4 Exch., 17; 2 Exch., 489; *Beverley's Case*, 4 Rep., 126; *Freed v. Brown*, 55 Ind., 310; *Edwards v. Davenport*, 20 Fed. Rep., 756; *Stewart v. Lispenard*, 26 Wend., 299; *West v. Russell*, 48 Mich., 74; *Searle v. Galbraith*, 73 Ill., 269; *Moore v. Hershey*, 90 Pa. St., 196; *N. N. Ins. Co. v. Blakenship*, 97 Ind., 535; *Scanlon v. Cobb*, 85 Ill., 296. Contra see *Seavers v. Phelps*, 11 Pick., 304; *Fitzgerald v. Reed*, 9 S. and M. (Miss.), 94; *Anglo-California Bank v. Aures*, 27 Fed. Rep., 727. If, however, the lunatic has been put under guardianship his contracts are void. *Ingraham v. Bladuin*, 9 N. Y., 45; *Runnells v. Gerner*, 80 Mo., 477; *Mansfield v. Felton*, 13 Pick., 206; *Lynch v. Dodge*, 130 Mass., 458.

Capacity of Married Women to make Negotiable Contracts.—At common law the contracts of married women were void; and this rule exists yet except so far as removal by statute. In some of the states, by statute she may contract as a *feme sole*, in others only as to her sole and separate property, while in others the common law rule is still in force. See statutes of your state;

also *Mason v. Morgan*, 2 A. E., 30; *Haly v. Lane*, 2 Atk., 181; *Lloyd v. Lee*, 1 Strange, 94. In those states which permit her to bind her separate estate by contracts, the contract must show in some way that it was her intention at the time the contract was executed and delivered. *Yale v. Dederer*, 22 N. Y., 450; *McVey v. Cantrell*, 70 N. Y., 295; *Second Nat. Bank v. Miller*, 60 N. Y., 639; *Kenton Ins. Co. v. McClellan*, 43 Mich., 564; *Todd v. Ames*, 60 Barb., 862; *Wolf v. Van Metre*, 23 Iowa 397. If these contracts are executed with a married woman as principal with a surety, the surety will alone be liable. At common law, where a man married a woman, who was a party to a bill, or note, he became responsible for such contracts. 1 Black. Com., 443; *Schonler's Domestic Rel.* 69. She is not estopped by her own representation that she is a *feme sole*. *Kemworth v. Sawyer*, 125 Mass., 29; *Waterbury v. Andrews*, 67 Mich., 282 and cases there cited.

Neither is she liable upon her promise made by her after her husband's death to pay a bill or note which she executed during his life time unless upon some new and good consideration. *Phillips v. Wicks*, 36 N. Y., 254; *Hetherington v. Nixon*, 46 Ala. 297.

A married woman may, however, be the agent for her husband and as such bind him by a note signed in her own name. *Abbott v. McKinley*, 2 Miles (Pa.), 220.

Liability of Husband for the Ante-Nuptial Commercial Contracts of the Wife.—If a woman executes and delivers a commercial contract while single, and before the same is paid marries, the husband becomes liable for the payment thereof. This liability of the husband, however, terminates with the expiration of the coverature. If the husband dies before proceedings are instituted upon such contracts the wife alone will be liable. *Byles on Bills and Notes*, 66.

If a commercial contract was given to a single woman and she married the property vested in her husband and he alone could indorse it at common law. At common law a note made payable to a married woman is in law a note to the husband and becomes instantly his property; and her indorsement transfers no property in the note unless the indorsement was made with the husband's knowledge and consent. *Savage v. King*, 17 Me., 301; *Holland v. Moody*, 12 Ind., 170; *Stevens v. Beals*, 10 Cush. (Mass.), 291; *Miller v. Delamaker*, 12 Wend., 433; *Mason v. Morgan*, 2 Ad. & Ellis, 30 (29 E. C. L. R.); *Prestwick v. Marshall*, 7 Bing., 565 (20 E. C. L. R.).

Liability of Wife—Exceptions to the General Rule.—“There are certain exceptional circumstances under which the contracts of a married woman may be binding upon her: (1) when husband is an alien enemy or civilly dead; (2) when wife has a separate estate; (3) when wife is a sole trader by special custom or statute; (4) when wife purchases necessities; (5) when husband

adopts her name as binding on him; (6) when wife is agent of husband." Dan. on Negot. Inst. Sec. 244.

If the husband is an alien enemy, he is prevented by law from coming to the aid of his wife; it is therefore necessary for her own maintenance and support to be permitted to make contracts. So also a married woman may become liable upon her contracts when in the execution thereof she intended to charge her sole and separate estate. In these cases, however, it is necessary that her contracts be entered into with reference to, and in the credit of, her separate estate. There must be an intention upon her part to make her separate estate liable. Some of the courts have held that this intention must be expressed in the contract itself; while others have held upon the contrary that it is sufficient if the intention can be implied. *Williams v. Urnston*, 35 Ohio St., 296; (See *Levi v. Earle*, 30 Ohio St., 147); *Frank v. Lilienfield*, 33 Gratt., 349; *McVey v. Cantrell*, 70 N. Y., 295; *Conlin v. Cantrell*, 64 N. Y., 219.

In many of the states there are statutes empowering married women to engage in business upon their sole and separate accounts, and when so empowered they may execute and deliver and render themselves individually liable upon their commercial contracts. *Canden v. Mulen*, 29 Cal., 566; *Wieman v. Anderson*, 42 Pa. St., 311; *Mudge v. Bullock*, 83 Ill., 22.

Married Women—Right to Contract—Statutory Rules.

—By statute in many of the states the common law rule concerning the right of a married woman to contract has been abrogated; so that now the wife may enter into any engagement or transaction which she might if unmarried.

Capacity of Partners to Bind the Firm upon Commercial Contracts.—It may be stated as a general proposition that each partner (except secret or dormant partners) has implied power to bind the firm. This authority is implied from the very nature and object of a partnership. It springs from the mutual agency of the co-partners for each other. This implied authority, however, depends largely upon the general character and purposes or objects of the partnership. If the partnership is a trading partnership the borrowing of money becomes an ordinary incident of the trading and each partner has an implied authority to bind the firm by making, drawing, endorsing or accepting in its name a commercial contract for partnership purposes. This is true whether he signs the name of the firm, or his own name. *Livingston v. Roosevelt*, 4 Johnson, 251; *Gayno v. Samuel*, 14 Ohio, 592.

A partner has no right to bind his co-partners by a commercial contract except in a partnership transaction. If, however, the partnership is not a trading firm one partner has no implied authority to bind the firm by making, drawing, endorsing or accepting commercial contracts. The reason therefor being that the power of each individual of a partnership to make such contract in

behalf of non-trading firms can only exist by virtue of the consent of all the partners. *Pease v. Cole*, 53 Conn., 53; *Walker v. Walker*, 66 Vt., 285; *Horn v. City Bank*, 33 Kan., 518; *Lee v. Bank*, 45 Kan., 8.

Upon these principles a member of a law firm cannot bind the partnership by a promissory note or other commercial contract without the consent of all the members of the firm; neither can one of the firm of practicing physicians bind it except for the necessities of their profession. *Dan. on Negot. Inst. Sec. 358*; *Tiedeman on Com. Paper, Sec. 97*; *Pease v. Cole*, 53 Conn., 53; *Bays v. Conner*, 105 Ind., 415; *Levi v. Lathan*, 15 Neb., 509; *Dowling v. National Bank*, 145 U. S., 512; *Crossthwait v. Ross*, 1 Humph (Tenn.), 23.

Partners—Form of the Signature of the Firm.—It is a strict rule that the name of the firm in the making, drawing, endorsing or accepting of commercial contracts, must be used, otherwise an action cannot be maintained against the firm; if, however, there is an immaterial variance the firm will be bound by the signature. But the firm will not be bound if the variance is material. It has been held that if the style of the firm was "John Burton," the firm will not be bound on a note signed by, "John Burton & Co." *Kirk v. Burton*, 9 M. & W., 284; *Tiedeman on Com. Paper, Sec. 103*.

When the firm name is signed by a member of the firm to a commercial contract it may be done by using the name of the partnership simply or the use of the partnership name per the partner. Thus the signature may be either "John Smith & Co." or "John Smith & Co." by John Smith. No special formality is required; but it must appear on the face of the paper that the contract is the obligation of the firm. So also have these contracts which read "I promise," and signed by one of the firm for the rest as A. B. for A. B. & Co. been held to bind the whole firm and not the signing parties singly. *Doty v. Bates*, 11 Johns, 544.

Capacity of a Corporation to Make Negotiable Contracts.—Corporations as a general rule have only such powers as are expressly conferred upon them by their charters and such implied powers as are necessary to the full and complete enjoyment of their express power. In order, therefore, to determine whether a corporation has authority to execute and deliver commercial contracts, an examination of its express powers—of its corporate charter must be made. If express authority, therefore, can not be found in its charter, then the inquiry arises is this power necessarily implied from the express powers or from the general nature or character of the institution. *Dartmouth College Case*, 4 Wheaton, 636.

According to the English rule all trading and banking corporations may execute and deliver commercial contracts without express authority so to do, because such acts are necessary to the

very object of their existence. *Broughton v. Manchester, Water Wks.*, 3 B. 7. Ald., 1.

In the United States it may be regarded as settled that the power of corporations to become parties to commercial contracts, is co-extensive with their power to contract debts. Whenever a corporation is authorized to contract a debt it may execute a negotiable contract to pay it. Every corporation, therefore, may become a party to commercial contracts for some purposes if it has the power to contract debts. A religious corporation which may need fuel for its rooms may give its note for the same. *Parsons on Bills and Notes*, 164, 165; *Catron v. I. & Society*, 46 Iowa, 108; *Dan. on Negot. Inst.*, Sec. 381.

A corporation, in order to obtain its legitimate and corporate objects, may deal precisely, through its agents and officers, as an individual may who seeks to accomplish the same ends. *Moss v. Averill*, 10 N. Y., 447, 449.

Where a corporation has power to purchase property or procure money on a loan in the course of its business, the seller or lender may exact, and the purchaser or borrower must have the power to give, assurances which do not fall within the prohibitions, express or implied, of some statute. *Curtis v. Leavitt*, 15 N. Y., 66; *Olcott v. Tioga R'y Co.*, 40 Barb., 179; *Monument Nat. Bk. v. Globe Works*, 101 Mass., 57.

Corporations Not Allowed to Become Accommodation Parties.—Unless the corporation, however, has been expressly authorized to become a party to commercial contracts it has not the power to bind itself upon accommodation paper; for an accommodation paper cannot be considered to be issued in the regular course of the corporation. But if the contract reaches the hands of an innocent endorsee the common law rule of negotiable paper applies, viz.: that the endorsee takes the paper free from the equitable defenses existing against it. So also will the corporation be liable upon its commercial contract in the hands of *bona fide* holders where the amount issued by the corporation is in excess of the amount authorized. *Ellsworth v. St. Louis R'y Co.*, 98 N. Y., 553; *National Bank v. Wells*, 79 N. Y., 498; *National Park Bank v. German Am. & Security Co.*, 5 L. Rep. A, 673.

It may be stated as a general rule that when a corporation has power under any circumstance to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which gave them the requisite authority. *Lexington v. Butler*, 81 U. S., 14.

Corporations—Power to Indorse Commercial Contracts.—Corporations, says Daniel in his work on Commercial Paper, having a right to receive bills or notes in payment of debts, have the implied right to indorse them, or to dispose of them by assignment without indorsement as may suit their purposes. *Marvine v. Hymers*, 12 N. Y., 223; *Hardy v. Merriweather*, 14 Ind.,

203; Dan. on Negot. Inst., Sec. 385. And if authorized to borrow money they may borrow a bill or a note and indorse it or assign it.

Corporations—Form of Their Contract.—As a general rule, a corporation can only contract by a writing under its common seal. But to this rule there are certain exceptions: (1) Where the contract is executed; (2) Where the acts done are of daily necessities to the corporation, or are too insignificant to be worth the trouble of affixing the common seal; (3) Where the corporation as a head, as a mayor, or a dean, who may give command which a party may obey without the sanction of a common seal; (4) Where the acts to be done must be done immediately and it would be impossible to wait for the formality of attaching the common seal; (5) Where the corporation is incorporated for the purposes of trade the very object of these institutions requires that they should exercise the right to execute and deliver commercial contracts which if executed and delivered under seal would destroy their very object, "negotiability." *Warren v. Lynch*, 5 Johnson, 239; *East London & Co. v. Bailey et al.*, 4 Bing., 283; 13 E. C. L. R., 435; *Story on Bills*, Sec. 62; *Tiedeman on Com-Paper*, Sec. 117.

Corporations—Authority of Agents.—Corporations can only act through their agents and therefore the power to appoint agents is necessarily implied. Usually the charter or by-laws of corporation provide or indicate the officers or agents of the corporation who shall have authority to bind the corporation in contract. In such cases contracts executed and delivered by other officers or agents purporting to bind the corporation would bear upon their face evidence of irregularity and be notice to all. Therefore every purchaser or holder of a promissory note of a corporation takes it at the peril of the officers' lack of authority to execute and deliver that particular contract. *Davis v. Rockingham & Co.*, 89 Va., 290. The corporation may be estopped to deny the authority of its officers or agents to execute and deliver promissory notes after they have received and used the proceeds.

Corporations—Public—Power to Execute Commercial Contracts.—Unless there is some restriction in the organic law there is no doubt that both the state and federal governments may through the proper agents become parties to any specie of commercial contract. *Miller, J.*, said "the authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of any officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it so when an officer or agent of the government at a distance, is entitled to money here, the person holding the funds may pay his drafts. And, whenever, in conducting

any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department, or officer has a right to do, then he can draw and bind the government in so doing. But the obligation resting upon him to perform that duty, and his right and authority to effect such an object is always open to inquiry; and if they be found wanting, or if they be forbidden by express statute then the draft or acceptance is not binding on the government. *Floyd Acceptances*, 7 Wall. 679.

Corporations—Municipal or Public—Power to Execute and Deliver Commercial Contracts.—The term public or municipal corporation is here used to include counties, townships, cities, towns and incorporated villages as well as school districts, parishes, and police districts. These corporations differ only in the relative quantity of powers conferred by the state government. As a general rule the state in creating these public corporations, either under general or special laws, defines and determines their power. And it is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. *Minturn v. Ladue*, 23 Howard 435. Upon the question whether a municipal or public corporation may become a party to a commercial contract through its lawful agents, there is much conflict in the authorities. It has been the subject of much discussion by text writers and of numerous decisions by the legal tribunals of the country. There is a marked distinction between the powers of private and public corporations in their powers to execute and deliver commercial contracts. As has been stated the right of private or trading corporations to issue commercial contracts or other evidences of indebtedness, unless restrained by their charters or the law of the land, may be conceded. Private corporations are organized for the purposes of trade and business, and the borrowing of money and the issuing of obligations therefor may be necessary to carry the very object of the corporation into effect. The objects of municipal corporations are very different. The ends and objects of municipal corporations are the comfort, protection and well-being of the people found within their geographical limits. In the case of the *City of Williamsport v. The Commonwealth*, Paxton, J., in discussing the rights of municipal corporations to borrow money and issue commercial contracts says, "taken in its broad sense, the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of municipal corporations. For general purposes he continues such power does not exist, for the reason that it is not necessary for the objects for which it was created. Thus it has never been contended that a municipality may borrow money and issue bonds or notes for ob-

jects having no necessary relations to the performance of municipal duties. To admit such a principle would be destructive of such organizations, and place the tax-payers of a city at the mercy of the first band of plunderers who should happen to obtain the temporary control of its affairs." 84 Pa. St., 487, 494. Judge Dillon says in his valuable work on Municipal Corporations that "we regard as a like unsound and dangerous that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes, and as incidental to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is to the view above indicated." Whether it is a wise policy or not certainly the legislature in creating municipal corporations may grant them full power and authority to execute and deliver commercial contracts. This power, however, has seldom ever been granted.

Parties—Executors and Administrators.—The rule is well settled that the executors or administrators have no power to bind the estate of the decedent by making, drawing, endorsing or accepting commercial contracts. *King v. Thom*, 1 Term R., 489; *Austin v. Munro*, 47 N. Y., 360; *Kessler v. Hall*, 64 N. C., 60; *Cornthwaite v. Nat. Bank*, 57 Ind., 268; *Rittenhouse v. Ammerman*, 64 Mo., 197. If, however, the executor or administrator does execute and deliver a commercial contract he thereby makes himself personally liable even though it is stated in the most explicit manner to have been executed and delivered in his representative capacity. *Edwards on Bills*, Sec. 79; *Christian v. Moris*, 50 Ala., 586; *Wisdom v. Becker*, 52 Ill., 346; *Kirkman v. Benham*, 28 Ala., 501.

Parties—Power of Personal Representatives to Transfer by Endorsement or Assignment.—While the personal representatives of deceased persons may not bind the estate of his decedent, yet he may transfer negotiable contracts belonging to the estate by either an endorsement or assignment. In case, however, such instruments are dishonored the personal representative is personally bound in such transfer unless he has expressly exempted himself from liability by the terms of the transfer. *Edwards on Bills*, 248; *Foster v. Fuller*, 6 Mass., 58. Where there are two or more executors or administrators any one of whom may transfer negotiable contracts, (unless by the terms of their trust forbidden), which were executed and delivered to the decedent during his life time. *Dwight v. Newell*, 15 Ill., 333; *Wheeler v. Wheeler*, 9 Cow., 34. It has been held, however, where the negotiable contract was made payable to the executors or administrators, that they must all join in the endorsement or assignment; *Smith v. Whiting*, 9 Mass. 334. But the better opinion seems to recognize no such distinction and in both cases an endorsement or assignment by the one representative is considered as effectual as that of all. *Bogert v. Hertell*, 4 Hill, 492; *Daniel on Negot. Inst.* Sec. 266.

Parties—Agents—Capacity of to Make Negotiable Contracts.—It may be stated as a general rule that whatever a man may do by himself he may do by his agent. Combe's Case 9 Rep. 75. An agency is a mere ministerial office, therefore infants, married women, persons attainted, out-lawed, aliens and others, though incapable of contracting on their own account, so as to bind themselves, may become agents. Chitty on Bills, 36.

Parties—Agents—Authority of.—Agents may be appointed either verbally or by a writing, or by subsequent ratification. The authority of an agent to transfer commercial contracts may be conferred by any one of these methods whether the principal be an individual or a corporation. Trudy v. Farrar, 32 Me. 225; Handy-side v. Cameron, 21 Ill. 588. No particular form of appointment is necessary to enable an agent to execute and deliver a commercial contract so as to charge his principal. He may be specially appointed for this purpose or may derive his power from some implied authority. It has been held that a verbal authority from the principal to his agent to transact *all* his business confers the power to assign and transfer negotiable paper. The authority of the agent, however, must always depend upon the construction of the words used in his appointment. Bailey v. Rawley, 1 Swan (Tenn.) 205; Rossiter v. Rossiter, 8 Wend. 494; Ward v. The Bank of Ky. 7 Mon. (Ky.) 93. The authority of an agent will be presumed to continue till due notice of its revocation has been given. The agent, of course cannot delegate his authority unless specially authorized so to do. Combe's Case 9 Rep. 75; Breuster v. Hobart, 15 Pick. 302; Lord v. Hall, 9 L. J., C. P., 147; 8 C. B. 627 (65 E. C. L. R.)

Parties—Joint Agents.—It is a general rule of the common law, that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it; for the authority is construed strictly and the power is understood to be joint and not several unless words of severality are used. Story on Agency, Sec. 42; Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Union Bank v. Beirne, 1 Grat. 226, 234, 539.

Parties—Agents—Signatures of.—It may be stated as a general rule that no one is bound upon a commercial contract who is not expressly a party to it. Therefore, the agent should be very explicit in his signature in order to make his principal liable and not himself. The signature of the agent followed by the word "agent" as follows, A. B., Agent, of C. D. is not sufficient to bind the principal and the agent alone is liable. Such a suffix is deemed to be a mere *descriptio personæ* and does not constitute any notice of the agency to the holder or endorsee. Collins v. The Buckeye Ins. Co., 17 Ohio St. 215; Williams v. Robbins, 16 Gray 77; Kenyon v. Williams, 19 Ind. 45; Bishop v. Rowe, 71 Me. 263; Bartlett v. Tucker, 104 Mass. 338. The following have been held

to be sufficient signatures by the agent to bind the principal: "A. B. by his agent C. D., or A. B. by C. D., or C. D. agent for A. B." Story on Agency, Sec. 274, 278; Long v. Colburne, 11 Mass. 97; Haight v. Naylor, 5 Daily 219. The rule that no person is liable upon a commercial contract unless his name, in some way, is disclosed upon the face thereof has been modified so that when the person signing his name with the word "Agent" added, is, in fact the agent of the principal, and the writing is executed in the course of the business of such agency, the principal is bound. Green v. Skeel, 2 Hun. 486; Larned v. Johnson, 9 Allen 419.

Parties—Guardians—Trustees—Power to Make Negotiable Contracts.—*Guardians and trustees have no power to bind the estate which they represent by commercial contracts. If, therefore, they execute and deliver commercial contracts in such capacity they will be personally liable even though they sign themselves as "Guardians or Trustees."* Dan. on Com. Inst., Sec. 271; Story on Notes, Sec. 63. If a guardian or trustee as such takes a commercial contract payable to him or to his order that he may transfer the title to the same by endorsement or assignment; but in case of default of payment he of course will be personally liable. Thornton v. Rankin, 19 Mo. 193; Shaw v. Spencer, 100 Mass. 382; Strong v. Straus, 40 Ohio St. 87.

Parties—Drunkards—Power to Make Negotiable Contracts.—It is a general rule at common law that a contract made by a person in a state of intoxication may be subsequently avoided by him, but if confirmed is binding on him. Anson on Contracts, 150. In order, however, that a drunken person may avoid his contract on account of intoxication it must appear that he did not understand the effect and consequence of his contract. Bush v. Breinig, 113 Pa. St. 310. It has also been held that a party to a contract cannot avoid it on account of intoxication unless another party to it uses means to induce such intoxication. Smith v. Williamson, 30 Pac. R.

Parties—Lunatics—Insane Persons—Power to Make Negotiable Contracts.—A contract of a lunatic or an insane person is voidable at his option if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing and that the other party knew of his condition. Molton v. Camroux, 4 Exch., R. 19; Mutual Life Ins. Co. v. Hunt, 79 N. Y., 541; Dehrens v. McKenzie, 23 Iowa, 333; Wilder v. Weakly, 34 Ind., 181; Shoulters v. Allen, 51 Mich., 530. It has been held, however, that the "fairness of the defendant's conduct cannot supply the plaintiff's want of capacity." Many courts have held that where the insane person receives no benefit whatever under the contract, the contract cannot be enforced against him, and if executed he may recover whatever of value he parted with, notwithstanding the other party to the contract may have acted in good faith without knowledge of the infirmity. Seavers

v. Phelps, 11 Pick., 304; Van Patton v. Beals, 46 Iowa, 63; Wierbach v. 1st. Nat. Bank, 97 Pa. St., 543; Moore v. Hershey, 90 Pa. St., 196; N. W. Mutual Ins. Co. v. Blankenship, 94 Ind., 535. Mere weakness of mind, however, not amounting to imbecility or insanity is no ground of defense provided no fraud has been practiced on the party. Dan: on Negot. Inst., Sec. 211; Stewart v. Lispenard, 26 Wend., 299.

SECTION 19.

A NEGOTIABLE CONTRACT MUST BE DELIVERED.

BURSON v. HUNTINGTON.¹

IN THE SUPREME COURT, MICHIGAN, OCT. 11TH, 1870.

[*Reported in 21 Mich., 415; 4 American Dec., 497.*]

This cause was brought into the Circuit Court for the County of Kalamazoo by appeal from the judgment of a Justice of the Peace, in an action in which Walter S. Huntington was plaintiff, and John W. Burson defendant.

Form of the Action.—The justice's transcript states that the plaintiff declared verbally on the common count in *assumpsit* and upon a promissory note, which was filed at the time of declaring, and of which the following is a copy, viz.:

“Schoolcraft, Mich., Apr. 12th, 1866.

“Ninety days from date, for value received, I promise to pay A. N. Goldwood, or order, one hundred and twelve dollars, and fifty cents, with interest.

John W. Burson.”

Indorsed on the back,

“A. N. Goldwood.”

Form of the Defense.—The defendant filed an affidavit denying the delivery of the note, and also a plea and notice in writing.

The defendant, in the affidavit filed, with his plea and notice, deposed “that the written instrument, declared on in this cause by said plaintiff, was never delivered by this defendant, to the said A. N. Goldwood, mentioned in said written instrument, nor to any other person for the said A. N. Goldwood, or any other person, and that this defendant never authorized any other person to deliver the written instrument

¹This case is cited in Tiedeman on Commercial Paper, 282; Edwards on Commercial Paper, 326, 328, 331, 335; Daniel on Negotiable Instruments, 122, 838; Wood's Byles on Bills and Notes, 254; Norton on Bills and Notes, 70, 250; Bigelow's Cases on B. and N., 227; Bigelow on B. and N., 176, 178, 227; Benjamin's Chalmers on Bills, Notes and Checks, 59, 62.

for him, (this defendant), to the said A. N. Goldwood, or to any other person; and defendant further says that this deponent never placed any United States internal revenue stamps upon said written instrument, and never authorized any other person to do so for him, or to cancel the same; that said written instrument was taken from the house of this defendant, in this defendant's absence from the same, by the said A. N. Goldwood, without the knowledge or consent of the deponent at the time."

On the trial before the justice, the jury found a verdict for the defendant, and the plaintiff appealed.

On the part of the defense in the Circuit Court, it was shown that Ellen Burson had been sworn as a witness before the justice, and that she had since died; "That Goldwood came to the house of defendant and told defendant he had come to finish up that matter. They sat down, and Goldwood wrote this note. Defendant signed it. Goldwood said he wanted security or a signer. Defendant said he would go out and see his uncle. His uncle was at the barn at the time. Defendant laid the note on the table, and told plaintiff not to touch it until he came back. Defendant went out of the house to the barn, and before he returned, Goldwood picked up the note and started out doors with it. She told Goldwood to let the note be on the table until defendant came back. Goldwood said he was going to take the note, or proposed to have it, or something to that effect, and went off with it. He started towards Kalamazoo. She said there was no stamp on the note at the time Goldwood took it away."

The counsel for the defendant then asked the court to charge the jury:

1st. That if they find that A. N. Goldwood, the payee named in the note, took this note after it was drawn and signed by defendant, without the knowledge, and against the will and consent of the defendant, and before the defendant had delivered the note to any person, the note thus obtained would be void in the hands of said Goldwood.

2d. That such note would be void in the hands of any subsequent holder, deriving possession of the same from said Goldwood, whether for value or not.

3d. If the jury shall find that the plaintiff had notice of the means and manner used by A. N. Goldwood, as above stated, in getting possession of the note at the time he indorsed and delivered it to the plaintiff, the plaintiff could not be considered an innocent holder of the note.

4th. That whether the plaintiff in this cause had such notice, or not, is a question of fact to be found by the jury from all the testimony in the case. That the fact of the plaintiff having such notice need not be proved by positive testimony, but may be proved by circumstances.

5th. That this note in suit, if drawn and signed by the defendant, and if not afterwards delivered by him or by his authority to some other person, has no legal existence, and is therefore void.

And thereupon the Court charged the jury as follows:

The present is an action of *assumpsit*, brought to recover the principal and interest moneys claimed to be due upon a negotiable promissory note. The plaintiff claims to be the holder of said note by purchase. The action is brought in the form prescribed by statute. The declaration consists of the common counts, with a copy of the note appended. The defendant having failed to deny the execution of the note on oath or by affidavit duly filed, it becomes unnecessary for the plaintiff to prove such execution on the trial of the case. By offering the note in evidence, then proving it to have been indorsed and delivered to him, the plaintiff in such case makes out a *prima facie* case for its recovery.

The real questions raised upon this trial are those stated in the defense set up, and had reference almost solely to the doctrine of our commercial law and the rights of the parties interested in negotiable or commercial paper. As between first parties to such paper, as maker, payee, the right of defense is generally as ample in range, as the facts which would invalidate the contract or claim; as, for instance, illegality, fraud, want or failure of consideration or any unwarrantable means for obtaining it. A like rule prevails in an action between the maker and a subsequent indorser, or holder, coming into possession or ownership after the note has matured, and become due and payable by its terms.

The same rule governs also as between the maker and holder by purchase before maturity and for value, but with notice of existing infirmities in the paper, or its surroundings, which would invalidate the same, as, for instance, that the note had been given upon the sale and purchase of intoxicating liquor in this state.

But when the action is between the maker and *bona fide* holder for value of negotiable paper, purchased before its maturity and without notice that the same is different, such holder is not subject to equities that may exist between first parties. The law commercial protects such holder from the defenses which might be set up, as between the parties. In general terms facts going to impeach or invalidate the paper cannot be resorted to on the defense. The rule itself is one of commercial necessity in order to impart confidence and steady value to this class of papers in commercial and business transactions.

The counsel for defendant has presented to the court a series of seven requests to charge the jury, and to which the court will now direct your attention. As to the first request, the court declines to charge as requested, but modifies the request to charge (in this form provisionally) that if a party negligently allows his negotiable note to get into circulation, or if after it has passed from his possession he either acknowledged or by silence acquiesced in a claim of its validity, by the holder; to which refusal to charge as requested, and also to said modification of the request, the counsel for defendant excepted.

As to the second request, the court declines to charge as requested; to which refusal to charge as requested in said second request, the counsel for defendant excepted.

As to the third request, the court charges you as requested, with the addition, that if they also find that Goldwood obtained the note by unlawful means of which the plaintiff had notice, then the plaintiff cannot be considered an innocent holder of the note. To the charge contained in the addition made by the court to the request, counsel for defendant excepted.

As to the fourth request, the court charges as requested.

As to the fifth request, the court charges that such note would be invalid in a suit between the original parties, but in the hands of an innocent holder for value before maturity and without notice, the rule would be subject to the qualifications and limitations already expressed in this charge. To the refusal of the court to charge as stated in this request, and to the charge as given by the court in relation thereto, counsel for defendant excepted.

The jury found a verdict for the plaintiff, and judgment being entered thereon, the defendant brings the cause into this court by writ of error.

The Claim of the Plaintiff.—That the court erred:

1st. In refusing to charge the jury that, if this note was never delivered by the maker, or some person authorized by him, to any other person, but was fraudulently or stealthily taken from the possession of the maker and in his absence by the payee, the note in the hands of the latter would be void.¹

2d. In refusing to charge the jury that such note in the hands of any other person deriving title from such payee would be void whether he gave value for it or not.²

3d. In refusing to charge the jury that, if they shall find that the note in question upon its face showed, at the time the plaintiff received it of Goldwood, or during the time Goldwood had the note, and plaintiff saw the same, that it was not properly executed and was invalid under the laws of the United States, for the want of a proper stamp, then the plaintiff cannot be considered as a *bona fide* holder, though he may have given value for the note.³

4th. In refusing to charge the jury that if the note bears upon its face an illegal stamping by the payee therein named, and did so bear such illegal stamping at the time it was indorsed to and obtained by the plaintiff, this fact alone should have been sufficient to put the plaintiff on inquiry as to its

¹ Story on Bills, §§ 185, 187, 203; 1 Cow. T. 209; 4 Green. 4, 28; 8 Vt., 94.

² 3 Caines, 217; 9 Johns, 295; 12 Do., 306.

³ Int. R. L., June 30, '64, § 158; 3 Parsons on Cont., 313; Peak, 173; 4 B. and C., 235; 6 D. and R., 306; 3 Camp., 103.

validity when he obtained it, and if he failed to do this he cannot be deemed an innocent purchaser for value.¹

The Claim of Defendant.—The other question, as to the delivery of the note, had been long since settled. A partial or total want, or failure, or illegality of consideration, or even fraud or a *defect or infirmity of title*, in the person from whom he received it, is no defense to the title or bar to a recovery by a holder for value without notice before maturity.²

A note is not void in the hands of an indorsee except in the instances where a statute makes it so; and if transferred before due to a *bona fide* holder, it cannot be shown that it has never been delivered. By making the note, and leaving where it is liable to be stolen or otherwise fraudulently put in circulation, he has enabled the fraudulent holder to impose upon the public; and if an innocent person must suffer, it should be that one who, by his acts, has enabled the third person to commit the fraud.³

Decision.—The defendant below having appeared before the justice and pleaded to the plaintiff's declaration, and twice obtained adjournments of this cause, it was too late, on the trial of the appeal in the circuit, to make any objection for want of proper service of the summons. After joining issue upon the merits, it was immaterial whether there had, in fact, ever been a summons issued.

There was no error, therefore, in overruling the defendant's objection to the introduction of evidence upon this ground.

The note declared upon was filed with the justice at the time of declaring; and by the statute,⁴ the plaintiff was therefore entitled to read the note in evidence without proving its execution, unless defendant denied its "execution on oath" at the time of pleading.

¹ Story on Notes, § 197; 12 Johns., 310; 3 Kent Com., 103; 4 Mass., 370; 6 Pick., 258; 14 Pick., 268; 1 Doug., 413; 4 Hill, 442.

² Story on Bills, § 188; Bostwick v. Dodge, 1 Doug., 413; Outhwite v. Porter, 13 Mich., 533; Vinton v. Peck, 14 Mich., 287.

³ Woodhull v. Holmes, 10 Johns. R., 231; Vallet v. Parker, 6 Wend., 615; Rockwell v. Charles, 2 Hill, 499.

⁴ Comp. L., § 3767.

Defendant pleaded the general issue, with a notice that he would prove that the note was obtained from him by fraud and without consideration, and other facts substantially the same as set forth in his affidavit made and filed with the plea and notice. This affidavit simply denied the delivery of the note by the defendant, or any other person on his behalf, to the payee or any other person for him, or that defendant ever placed any stamp upon it or authorized any other person to do so, or to cancel such stamp, and stated that the paper was taken from deponent's house, in his absence from the same, by the payee, without the knowledge or consent of deponent.

It is unnecessary to determine here whether the execution of the note under this statute would include its delivery as a part of the execution; since, granting the affirmative, the *signature* certainly constitutes a part of its execution, and the affidavit being special,—not denying the execution generally, but merely the delivery and the affixing and canceling of the stamp,—admits, by a very clear implication, his signature to the instrument, and clearly indicates that he intends to contest only the delivery, the stamping and canceling of the stamp, and not his signature; otherwise, he would have denied the execution generally and brought himself within the language of the statute. The plaintiff, therefore, was not bound to prove such portion of the execution as was not denied, but admitted, viz.: the signature of the defendant.

The case upon the trial stood in all respects as if the signature of the defendant had been admitted in open court. And this admission is to have at least as full effect as the clearest proof of such signature.

Now proof of such signature, together with the fact that the note is in the hands of, and produced by, the plaintiff (the indorsement being proved as it was here), furnishes strong presumptive evidence of delivery by the maker to the payee; and this is, in fact, all the proof ordinarily given by the plaintiff of such delivery when the execution of the note is denied. It establishes a *prima facie* case upon this point; and it is for the defendant, if he contests the fact of delivery, to sustain his denial by proof.

The indorsement by the payee having been proved, there

was, therefore, no error in allowing the note to be read in evidence.

We think the court erred in striking out the testimony of the witness, Fletcher, showing what the sister of the defendant testified to on the trial of this cause before the justice, she having since died. The ground upon which this was stricken out seems to have been, because the witness did not recollect the precise words of the former testimony, though he stated that he recollected and gave the substance. We think the objection, under such circumstances, untenable, and that the evidence was admissible.¹ An additional ground of objection was stated, viz.: that plaintiff was shown to be a *bona fide* holder of the note; but the court could not have stricken out the evidence on this ground, as there was some evidence of circumstances tending to show he was not such *bona fide* holder, and the court left this question to the jury.

But this note was indorsed by Goldwood, the payee, to the plaintiff, before maturity, for a valuable consideration, and, as plaintiff claims, in good faith and without notice of a want of delivery or of consideration, or any other circumstance tending to invalidate it in the hands of Goldwood; and his evidence tended to show this, though there was evidence of some circumstances tending to show that he had notice of the circumstances under which the paper had been obtained.

There was also evidence on the part of the defendant, strongly tending to show that the note never was delivered by the defendant, but that Goldwood, to whose order it was drawn, was endeavoring to sell to the defendant a patent right, or the right of certain territory under it, and that the parties had so far progressed towards the making of an arrangement to this end, that it was understood and verbally agreed that Goldwood was to give him a deed of certain territory, upon defendant's executing to him a note for the amount, with some other person signing it as surety. That the parties being in the defendant's house, and defendant's sister being present, Goldwood wrote this note, and defendant signed it; but as a surety was to be obtained, he laid the note on the

¹ See 1 Greenl. Ev. Sec. 165, and authorities cited.

table and went out to find his uncle for that purpose, telling Goldwood, as he went out, not to touch it till he came back; but that while defendant was gone, Goldwood picked up the paper and started out doors with it; that defendant's sister then told him to let the note be on the table till defendant should come back, to which Goldwood replied he was going to have the note, and went off with it, without giving any deed of territory or anything else for it. That the note, at this time, was not stamped, and defendant never stamped or authorized it to be stamped; that some four days after, Goldwood wrote to defendant requesting him to come immediately to Kalamazoo "and sign stamp on the note," and saying if defendant was not there by Tuesday evening "I shall consider that you refuse your signature, and shall act accordingly." The evidence also tended to show that defendant called upon Goldwood about that time, while the latter had the note, and demanded it, accusing him of stealing it, to which Goldwood replied, "Never mind, we can fix that up," and said he was ready to do as he had agreed, and wanted defendant to get another signer, and he would give him a deed of territory; but defendant said he did not want the deed, but wanted the note. Goldwood refused to return the note, or to give a deed till he got another signer.

These facts, if found by the jury, would show, not only that, the note was never delivered to the payee, and that it therefore never had a legal existence as a note between the original parties, but that there was yet no completed or binding agreement of any kind, and was not to be until defendant should choose to get a surety on the note, and the payee should give him a deed of territory. Until thus completed, the defendant had a right to retract.

The General Rule as to the Necessity of a Delivery.—As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delived in accordance with the purpose and intent of the parties.¹

¹ See Edwards on B. and N., 175, and authorities cited, and 1 Pars. on B. and N., 48 and 49, and cases cited and see Thomas v. Watkins, 16 Wis., 549; Mahon v. Sawyer, 18 Ind., 73; Carter v.

Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect from the delivery and not from the date.¹ This is certainly true as between the original parties.

But negotiable paper differs from ordinary written contracts in this respect: that even a wrongful holder, between whom and the maker or indorser the note or indorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker.

When a note payable to bearer, *which has once become operative by delivery*, has been lost or stolen from the owner, and has subsequently come to the hands of a *bona fide* holder for value, the latter may recover against the maker, and all indorsers on the paper when in the hands of the loser; and the loser must sustain the loss.² In such a case there was a *complete legal instrument*; the maker is *clearly liable to pay* it to some one; and the question is only to whom.

But in the case before us, where the note had never been delivered, and therefore *had no legal inception or existence* as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of

McClintock, 29 Mo., 464; Walker v. Ebert, 29 Wis., 94; Hillsdale College v. Thomas, 40 Wis., 6, 1; Purviance v. Jones, 120 Ind., 162; Worth v. Case, 42 N. Y., 362; Contra, see Kinyon v. Wohlford, 17 Minn., 239; Shipley v. Carrol, 45 Ill., 285 (stolen note); Gould v. Seger, 5 Duer. (N. Y.), 268; Cooke v. U. S., 91 U. S., 389.

¹ 1 Pars., ubi supra.

² In the case of Burson v. Huntington, however, the note had never as yet received any vitality as a contract, for the reason that all the requisites necessary to give it an existence had not yet been complied with.

the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the *theft* or wrongful *seizure* of this paper *create a valid contract* on the part of the maker *against his will*, where *none* existed *before*? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note.

But it is urged that this case falls within the general principle which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it. This is a principle of manifest justice when confined within its proper limits. But the principle as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged, can properly be said to have "enabled the third person to occasion the loss," within the meaning of the rule. If I leave my horse in the stable, or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality. And upon examination it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss, has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss; and that the party has been held responsible for the acts of those in whom he had trusted upon grounds analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions, by which the rights of others may be affected, has, as to the persons to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or *indicia* of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confi-

dence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leaves the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to, or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions *not apparent upon the face of the paper*, and the person to whom it is thus entrusted violate the confidence reposed in him, and put the note into circulation; *this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such bona fide holder*; or if the note be sent by mail, and get into the wrong hands; as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect, if the note or indorsement were signed in blank, if the maker or indorser part with the possession, or authorize a clerk or agent to do so, and it is done.¹

And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must, doubtless, as between him and an innocent holder for value, bear the consequences of his own

¹ 1 Parsons on Bills and Notes, 109 to 114, and cases cited, especially Putnam v. Sullivan, 4 Mass., 45, which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerks as to the delivery.

credulity and want of caution. He has placed a confidence in another, and by putting the papers into his hands, has enabled him to appear as the owner, and to deceive others. Cases of this kind are numerous; but they have no bearing upon the wrongful taking from the maker, when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; when it is laid down as a general rule, that it is no defense for a maker, as against a *bona fide* holder, to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

We do not assert that the general rule we are discussing—that “where one of two innocent parties must suffer,” etc.—must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where the culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation, might justly estop him from setting up non-delivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken.

Upon this principle the case of *Ingham v. Primrose*¹ was decided, where the acceptor tore the bill into halves (with the intention of canceling it) and threw it into the street, and the drawer picked them up in his presence, and afterwards pasted the two pieces together and put them into circulation.²

¹ 7 C. B. (N. S.), 82.

² See also by analogy *Foster v. Mackinnon*, Law Rep. 4 Com. B., 704. See also the cases where the *execution* and *delivery* were obtained through fraud and misrepresentation, *Chapman v. Rose*, 56 N. Y., 137; *Page v. Krekey*, 137 N. Y., 313; *Clark v. Pease*, 41 N. H., 414; *Walker v. Ebert*, 29 Wis., 194; *De Camp v. Hanna*, 29 Ohio St., 467; *Green v. Wilkie*, 66 N. W. Rep., 1046; *Puffer v. Smith*, 22 Mich., 479.

But the case before us is one of a very different character. No actual delivery by the maker to anyone for any purpose.

The evidence tends to show that when he left the room in his own house, the note being on the table, and his sister remaining there, he did not confide it to the custody of the payee, but told him not to take it, and no final agreement between them had yet been made, and no consideration given. Under such circumstances he can no more be said to have trusted it to the payee's custody or confidence, than that he trusted his spoons or other household goods to his custody or confidence; and there was no more apparent reason to suppose he would take and carry off the one, than the other.

The maker, therefore, cannot be held responsible for any negligence; there was nothing to prove negligence, unless he was bound to suspect, and treat as a knave, a thief or a criminal, the man who came to his house apparently on business, because he afterwards proved himself to be such. This, we think, would be preposterous.

We therefore, see no ground upon which the defendant could be held liable on a note thus obtained, even to a *bona fide* holder for value. He was guilty of no more negligence than the plaintiff who took the paper, and the plaintiff shows no rights or equities superior to those of the defendant.

Such, we think, must be the result upon principle. We have carefully examined the cases, English and American, and are satisfied there is no adjudged case in the English courts, so far as their reports have reached us, which would warrant a recovery in the present case. Some *dicta* may be found, the general language of which might sustain the liability of the maker; such as that of Alderson Baron in *Marston v. Allen*,¹ cited by Duer. J., in *Gould v. Segee*,² and that used by Williams J., in *Ingham v. Primrose*.³ But a reference to the cases will show that no such question was involved, and that these remarks were wholly outside of the case.

¹ 8 M. and W., 494.

² 5 Duer. (N. Y.), 260.

³ 7 C. B. (N. S.), 82.

On the other hand, *Hall v. Wilson*,¹ contains a *dictum* fully sustaining the views we have taken.

There are, however, two recent American cases, where the note or indorsement was obtained without delivery, under circumstances quite as wrongful as those in the present case, in one of which the maker, and in the other the indorser, was held liable to a *bona fide* holder for value: *Shipley v. Carroll, et. al.*,² (case of maker) and *Gould v. Segee*.³ But in neither of these cases can we discover that the court discussed or considered the real principle involved; and we have been unable to discover anything in the cases cited by the court to warrant the decision. It is possible that the case in Illinois may depend somewhat upon their statute, and the note being made as a mere matter of amusement, and the making not being justified by any legitimate pending business, the maker might perhaps justly be held responsible for a higher degree of diligence, and therefore more justly chargeable with negligence under the particular circumstances, than the maker in the present case.

There is another case, *Worcester Co. Bank v. Dorchester & Milton Bank*,⁴ where *bank bills* were stolen from the vault of the bank, which though signed and ready for use, had never been yet issued, and on which a *bona fide* holder for value was held entitled to recover. This, we are inclined to think, was correct. The court intimated a doubt whether the same rule should apply to *bank bills* as to ordinary *promissory notes*, and as to the latter, failed to make any distinction between the question of delivery and questions affecting the rights of the parties upon notes which have become effectual by delivery. But we think *bank bills* which circulate universally as *cash*, passing from hand to hand perhaps a hundred times a day, without such inquiries as are usual in the cases of ordinary *promissory notes* of individuals, stand upon quite different grounds. And, considering the temptations to burglars and robbers, where large masses of bank bills are known to be

¹ 16 Barb., 548, 555, and 556.

² 45 Ill., 285.

³ 5 Duer. (N. Y.), 266.

⁴ 10 Cush., 488.

kept, and the much greater facility of passing them off to innocent parties, without detection or identification of the bills or the parties, and that the special business of banks is dealing in, and holding the custody of money and bank bills; it is not unreasonable to hold them to a much higher degree of

Delivery Defined.—"Delivery," says Mr. Daniel, "is the final step necessary to perfect the existence of any written contract; and, therefore, as long as a bill or note remains in the hands of the drawer or maker it is a nullity. And even though it be placed by the drawer or maker in the hands of his agent for delivery, it is still undelivered as long as it remains in his hands, and may be recalled." Dan. on Negot. Inst., Sec. 63.

Kinds of Delivery.—The delivery may be actual or constructive; but it is essential to the validity of a commercial contract that it be delivered. *Palmer v. Poor*, 121 Ind., 138; *McFarland v. Sikes*, 54 Conn., 250.

The mere act of signing a commercial contract, without delivering it, does not make it the contract of the signer. *Burrage v. Lloyd*, 1 Exch. R., 32; *Brind v. Hampston*, 1 M. & W., 365; *Hill v. Wilson*, 16 Barb., 548; *Mahon v. Sawyer*, 18 Ind., 73.

No particular form of delivery, however, is required. Whether there was a delivery or not, must in a great measure depend upon the peculiar circumstances of each case. The question of delivery is one of intention. The delivery is complete when there is an intention manifested on the part of the maker of the contract to make himself liable thereon. The intention always controls the determination of what constitutes a sufficient delivery. The intention may be manifested by words or acts and in the most informal manner. The act of delivery is not necessarily a transfer of the possession of the instrument to the payee. It is any act of the maker, indicated by acts or words or both, which shows an intention on his part to perfect the transaction. It may be to the maker or to some third person for his use and benefit. *Thatcher v. St. Andrews Church*, 37 Mich., 269; *Woodward v. Campbell*, 22 Conn., 459; *Martin v. Flaharty*, 13 Mont., 96; 32 Pac. R., 287; *Hathaway v. Payne*, 34 N. Y., 92; *Newton v. Bealer*, 41 Iowa, 334; *Shults v. Shults*, 158 Ill., 654.

The delivery may be, upon condition, to an agent or in escrow.

Delivery—Sufficiency of.—While delivery, either actual or constructive, is essential to the validity of commercial contracts, yet it need not pass into the personal possession of the payee. If delivery is made to a person for the benefit of the payee unconditionally, such delivery is sufficient. *Gordon v. Adam*, 127 Ill., 223.

It must appear by the act of the party that he intended to make the contract an enforceable obligation against himself according to its terms by surrendering control over it, and intentionally place it under the control of the payee or of some third person

care, and to make them absolutely responsible for their safe keeping. We do not therefore regard this case as having any material bearing upon the case before us.

for his use. *Purviance v. Jones*, 120 Ind., 162; *Webber v. Christen*, 121 Ill., 91; *Stone v. French*, 37 Kang., 145.

Delivery—Conditional.—A commercial contract may be delivered upon condition. And the maker will not be liable to the original parties or to those who take with notice of the condition, unless such conditions happen. If, however, the contract comes into the hands of a *bona fide* holder, he will be liable thereon whether the condition happens or not. *Fisher v. Fisher*, 98 Mass., 303; *Whitmore v. Nickerson*, 125 Mass., 496; *Gilman v. New Orleans &*, 72 Ala., 566.

Where one signs a commercial contract upon the express condition that it shall be signed by others before delivery, he is not bound thereby unless such signatures are procured. *German-American Nat. Bk. v. People's Gas & E. Co.* (Minn.), (1895), 65 N. W. R., 90; *Ward v. Johnson*, 57 Minn., 301; *McCormick Harvesting Mach. Co. v. Faulkner*, 64 N. W. R., 163; *Ware v. Allen*, 128 U. S., 590.

Whether a commercial contract has ever been delivered or not upon a condition may always be proved in order to avoid its effect as between the original parties. *Roberts v. McGrath*, 38 Wis., 52; *Cline v. Guthrie*, 42 Ind., 227.

If, however, the contract has actually been delivered and is complete upon its face and has been obtained without fraud, evidence of an oral agreement between the parties to it will not be received to contradict the obligation of the maker as stated in it. *Chicago Cottage Organ Co. v. Swartzell*, 60 Mo. App., 490; *Hassmann v. Holscher*, 49 Mo., 87.

If the condition imposed upon the delivery is meaningless when read in connection with the rest of the note, it will have no effect. *Cooper v. Chicago Cottage Organ Co.*, 58 Ill. App., 248.

Delivery—When Made.—The delivery of a commercial contract must be made during the life-time of the maker; it follows, therefore, that no delivery can be made after the death of the maker, by his executor or administrator. *Clark v. Sigourney*, 17 Conn., 511; *Clark v. Boyd*, 2 Ohio, 35.

Neither can it be delivered by the maker's agent after death, as death revokes the agency. *Turnan v. Temke*, 84 Ill., 286; *Barrows v. Barrows*, 138 Ill., 654.

If there be an unconditional delivery to a third person who holds as the agent of the payee, until after the death of the maker it is a good delivery. The maker thereby lost control of the note. *Thompson v. Candor*, 60 Ill., 244; *Gordon v. Adams*, 127 Ill., 223.

We think the Circuit Court erred in refusing to charge upon this point, as requested by the defendant below.

We do not think there was any error in refusing to charge that the want of a stamp on a note would be such circum-

In every case where if a party places his commercial contract beyond his control he will be liable thereon without reference to conditions imposed if it gets into the hands of a *bona fide* holder for value. *Collins v. Gilbert*, 94 U. S. &, 53; *Redlich v. Dall*, 54 N. Y., 234; *Clarke v. Thayer*, 105 Mass., 216; *Kohn v. Watkins*, 26 Kan., 691; 40 Am. R., 336.

It has been held that where the maker is induced by false and fraudulent representations to execute and deliver a commercial contract to a fictitious person or order, supposing him to be real, and delivers the same with instructions to deliver it to the payee on receiving a mortgage security, and the fraudulent receiver negotiates the bill to an innocent person, the maker is liable. *Phillips v. ImThurn*, 114 E. C. L. R., 694; *Forbes v. Epsy*, 21 Ohio St., 474; *Kohn v. Watkins*, *supra*.

Delivery may be Compelled.—Where the payee has been induced to part with consideration or to advance money on the faith that a commercial contract has been delivered to a third person for his benefit, he is entitled to compel the delivery to be perfected. *Purviance v. Jones*, 120 Ind., 162; 16 Am. St. R., 319.

Delivery—Presumption as to the Time of.—In the absence of any proof to the contrary, there is a presumption of law that a commercial contract was delivered on the day it was executed. *Morgan v. Burrow*, 16 So. R., 432.

This presumption, however, may be rebutted by parol evidence showing that the contract was actually delivered on some other day. *Lovejoy v. Whipple*, 18 Vt., 379.

Where, however, the contract is made payable at a certain time after date, the fact that it was not delivered at the time of its date will not be allowed to vary the time of maturity. *Powell v. Watters*, 8 Cow., 669; *Tied. on Commercial Paper*, sec. 34b.

Delivery in Escrow.—Commercial contracts, like other contracts, may be delivered in escrow, which is a delivery to some third person to be delivered to the payee finally upon the performance of some condition or conditions, when the title is to pass to the person for whom it is intended.

A delivery in escrow to be good, the maker of the contract must part with the possession and divest himself of all power and dominion over it. *Preutsman v. Baker*, 30 Wis., 644; *Lehigh Coal & Iron Co. v. West Superior Iron & Steel Co.*, 91 Wis., 122; *Shults v. Shults*, 159 Ill., 654; see also 37 Am. St. R., 259; 83 Am. Dec., 246; 6 L. R. A., 470; 7 L. R. A., 746; 11 Am. St. R., 313.

In order that a writing may be in escrow, it must be placed in the hands of a third person to be delivered upon the happening of

stance of suspicion as to put the indorsee upon inquiry in taking the note. Under our decisions the note would be valid and could be enforced in our courts without a stamp.

Some other minor questions were raised, but we do not think they will be likely to arise upon a new trial.

a contingency. It must not be delivered into the hands of the payee. *Webber v. Christen*, 121 Ill., 91; *Wright v. Shelby &*, 16 B. mon., 4; *Scott v. State Bank*, 9 Ark., 36.

If the contract is delivered to the payee, the delivery will be absolute notwithstanding conditions were imposed and the title passes to the payee. *Fairbanks v. Metcalf*, 8 Mass., 230; *Jane v. Gregory*, 42 Ill., 416. The maker will be liable thereon should the contract reach the hands of an innocent *bona fide* holder without the happening of the condition on which it was delivered. *Vallett v. Parker*, 6 Wend., 616; *Fearing v. Clark*, 16 Gray, 74; *Graff v. Logue*, 61 Iowa, 704.

The delivery in escrow may be made to the payee if the condition is placed upon its face, and the maker thereof will not be liable thereon until the happening of such condition, even in the hands of a third person. Some cases have held, however, that where a contract was delivered in escrow and the custodian, without authority, delivers the same to the payee before the performance of the conditions, that the maker is not liable thereon even to a *bona fide* holder. *Chipman v. Tucker*, 38 Wis., 43; *Skaaraas v. Finnegan*, 31 Minn., 48; *Benton v. Martin*, 52 N. Y., 574; *Belle-ville Bank v. Borneman*, 124 Ill., 205; *Roberts v. Wood*, 38 Wis., 60.

Where one signs a negotiable contract upon condition that certain other persons shall sign it also and delivers it to the payee, he is not liable thereon unless such other signatures are procured unless the same shall get into the hands of a *bona fide* holder. *German-American Nat. Bk. v. Peoples Gas & Co.*, 65 N. W. R. 90; *Ward v. Johnson*, 37 Minn., 301. *McCormick Harvesting Mach. Co. v. Faulkner*, 64 N. W. R., 163.

It has been held that a *bona fide* holder for value, without notice, is entitled to recover upon any commercial contract which he has received before it has become due, notwithstanding any defect or infirmative in the *title* of the person from whom he derived it; as, for example, even though such person may have acquired it by fraud or even by theft or by robbery. *Kinyon v. Wohlford*, 17 Minn., 239; *Story on Promissory Notes*, sec. 191; *Goodman v. Simons*, 20 How., 365; *Wheeler v. Guild*, 20 Pick., 545; *Foy v. Blackstone*, 31 Ill., 538.

It is a general rule that the maker of a commercial contract which has not been delivered, is not liable thereon. If, however, through his negligence the contract gets into circulation and reaches the hands of a *bona fide* holder, he is liable upon the well

The judgment must be reversed with costs, and a new trial awarded.

The other justices concurred.

settled principle that where one of two innocent persons must suffer, the loss should fall upon him who put it in the power of the third person to cause such loss.

Delivery on Sundays.—In the absence of a statutory provision to the contrary, commercial contracts may be executed and delivered on Sunday. There was no rule at common law forbidding it. *O'Rourke v. O'Rourke*, 43 Mich., 58; *State Capital Bank v. Thompson*, 42 N. H., 369; *Mackalley's case*, 9 Coke, 66b.

In many of the states there are statutes which make contracts executed and delivered on Sunday void as between the original parties, but they are valid in the hands of *bona fide* holders. *Stevens v. Wood*, 127 Mass., 123; *Sayre v. Wheeler*, 31 Iowa, 112.

If the note is executed on Sunday but not delivered until a week day it will be valid. *Vinton v. Peck*, 14 Mich., 287; *Conrad v. Kinzie*, 105 Ind., 287; *Hilton v. Houghton*, 35 Me., 143.

The maker may ratify a contract executed and delivered on Sunday. *King v. Fleming*, 72 Ill., 21.

Parol evidence is admissible to show that the note was actually delivered on a different day from its date. *King v. Fleming*, *supra*.

The rule which controls in the execution and delivery of commercial contracts on Sundays applies also to contracts of endorsements. *State Capital Bank v. Thompson*, 42 N. H., 370.

SECTION 20.

A NEGOTIABLE CONTRACT MUST BE SIGNED.STOESSIGER v. THE SOUTHEASTERN RY. CO.¹

IN THE COURT OF QUEEN'S BENCH, EASTER TERM, APRIL 21, 1854.

[*Reported in 3 Ellis & Blackburn (Q. B.), 549; (77 Eng. Com. Law, 548); 23 Law Jr. Rep. (N. S.) (Com. Law), 293.*]

The Form of Action.—The declaration stated that defendants were proprietors of a railway, to wit, a railway from Strood in Kent to London, and were common carriers of goods and chattels for hire: and plaintiff caused to be delivered to defendants, as such common carriers, a certain parcel and divers goods and chattels of plaintiff contained therein, to wit, certain papers and documents of small value, and the sum of 9*l.* 10*s.* in cash, to be safely and securely carried and conveyed for plaintiff by defendants from Strood upon the said railway, and upon and by other railways and conveyances, and to be caused by defendants to be safely and securely delivered for plaintiff to the consignee of the said parcel, to wit, one Gideon Goold, at a certain other place, to wit, Birmingham, for certain reasonable reward: yet defendants, not regarding their duty as such common carriers, but contriving, etc., did not nor would safely or securely carry, etc., the parcel to Birmingham, nor there cause the same to be safely and securely delivered for plaintiff to the consignee, but, being such carriers, so carelessly and negligently conducted themselves in the premises that, by and through the carelessness, negligence, and improper conduct of defendants in that behalf, the said parcel was opened after the same had been delivered to defendants as aforesaid, and before the same was delivered to the consignee: and the said sum of 9*l.* 10*s.* in cash, being part of the contents of the said parcel, was abstracted therefrom by some person or persons whose names or name are to plaintiff unknown: and the parcel and part

¹ This case is cited in Norton on Bills and Notes, 60; Daniel on Negotiable Instruments, 92; Tiedeman on Commercial Paper, 11; Randolph on Commercial Paper, 62, 290; Wood's Byles on Bills and Notes, 156.

only of the said goods and chattels contained therein, to wit, the said papers and documents of small value, were delivered to said consignee; and the residue of the goods and chattels contained in the parcel, to wit, the said sum of 9*l.* 10*s.* in cash, was never delivered to the consignee: whereby the said sum of 9*l.* 10*s.* was not safely or securely carried or conveyed, or caused to be delivered as aforesaid, but became and is wholly lost to plaintiff.

Form of Defense.—That the said parcel, at the time of the said delivery thereof to and receipt by defendants of the same, contained property of a certain description, to wit, money and current coin of the realm, and a bill of exchange for the payment of money; and the value of the same exceeded the sum of 10*l.*: and that the said parcel, with its said contents, was delivered to defendants, as common carriers of goods by land, to be by them conveyed and carried as in the declaration mentioned at a certain office or receiving-house of defendants for the receipt of goods to be carried by them, as such carriers as aforesaid. That, before and at the time when the said parcel with its said contents were so delivered at the said office or receiving-house, defendants had caused to be affixed, and there was then affixed, according to the form of the statute in such case made and provided, in legible letters or characters, in a public and conspicuous part of the said office or receiving-house, a notice stating that a certain increased rate of charge therein mentioned was required to be paid, over and above the ordinary rate of carriage, for the safe conveyance of certain articles in the said notice mentioned; and among which money and bills of exchange were included and stated. That the nature and value of the said contents of the said parcel were not declared by plaintiff or by the person who sent or delivered the said parcel and its contents at the said office or receiving-house; nor was the said increased charge, nor any engagement to pay the same, accepted by the person receiving the same at the said office or receiving-house.

Replication.—That the value of the said parcel, and its contents, did not exceed the sum of 10*l.*

On the trial the following facts appeared: The plaintiff

was a commercial traveller in the employment of Gideon Goold, named in the declaration, who resided at Birmingham. A person named Cruttenden, residing at Chatham, being indebted to Goold to the amount of 11*l.* 10*s.* gave to the plaintiff at Chatham, to be by him transmitted to Goold, an instrument of which the following is a copy:

“£11: 10: 0.

“*Birmingham, Sept., 1852.*

“*Three months after date pay to my order the sum of eleven pounds and 10*s.*, value received.*

[Across the face of this instrument was written “Accepted payable at Bank. G. CRUTTENDEN.”]

Goold was to complete this instrument, which was stamped with a two shilling bill stamp, by signing his own name as drawer. The plaintiff had no authority to draw or accept bills for Goold. He accordingly enclosed the document, together with gold and silver to the amount of 9*l.* 10*s.*, on account of a private debt of his own to Goold, in a parcel, which he directed to Goold at Birmingham, and delivered to defendants, at their station at Strood, to be carried; and which they received for that purpose. There was affixed, in a conspicuous part of the office where the parcel was received, a notice, requiring an increased rate of charge, according to stat. 11 G. 4 and 1 W. 4 c. 68, ss. 1 and 2, for the articles specified in sect. 1. No notice of the value or contents of the parcel was given, nor any increased rate paid or agreed for. The cash was abstracted from the parcel, by some means which did not appear, before it reached Goold: the remainder of the contents came safely to hand.

Claim of Defendant.—On this evidence, the counsel for the defendants contended that the parcel contained, within the meaning of the Carriers’ Act, stat. 11 G. 4 & 1 W. 4 c. 68, s. 1, gold or silver coin of the realm, and a bill, note, or security for payment of money, or writing, the value of the whole exceeding 10*l.*, and that, no notice of the value or contents having been given, or increased rate paid or contracted for, the defendants were not liable for the loss.

Claim of Plaintiff.—The plaintiff’s counsel contended that the document, being incomplete, was of no value as a

security or writing, and that therefore the parcel contained no articles, within the meaning of the statute, of the value of more than 9*l.* 10*s.*

The learned Judge directed a verdict for the plaintiff for 9*l.* 10*s.*, reserving leave to move to enter the verdict for the defendant if the skeleton bill was an article within the Carriers' act, and was of such a value as to make together with 9*l.* 10*s.* more than 10*l.* It was agreed that the jury were to be taken as finding, so far as it was a question for them, that the writing was of no value.

The question is, whether this document was of any value as a bill or note, security or writing, within the meaning of the statute. It was not a bill of exchange; for there was no drawer. Nor was it a promissory note. In *Petro v. Reynolds*, 9 Exch., 410, a person drew a bill of exchange without any direction; and another person accepted it in defendant's name, professing to do so as agent for defendant. The Court appeared disposed to consider that this was not a bill of exchange, though, if the defendant ratified the promise to pay, it might be treated as his promissory note. But there the document, whether a bill or promissory note, was a promise by a person named, to pay to the order of another named: here Goold has not become a party in any way; nor is he named. There is neither drawer nor payee. The only name on the document is that of Cruttenden; and he does not engage to pay, except to the order of a person not named, and who has in fact made no order. Cruttenden can not have meant to pay the bearer generally. Nor does it fall under the head of "securities for payment of money." In *Rex v. Hart*,¹ a person signed a blank acceptance on a paper which had a six shilling stamp: it was afterwards taken away and filled up as a bill of exchange for 500*l.* Littledale, J., Bolland, B., and Bosanquet, J., held that this, at the time of such taking, was not a "bill, note, warrant, order, or other security whatsoever for money or for payment of money," within stat. 7 & 8 G., 4, c. 29, s. 5. Littledale, J., said that the instrument was "only in a sort of embryo state." [Ld. Campbell, C. J.—It is more like an authority for making a

¹ 6 C. & P., 106 (E. C. L. R., vol. 25).

security than an actual security.] Further, if it is contended that this was a writing of the value of 11*l.* 10*s.*, the answer is that the value which is to bring the case within the statute must be a value existing at the time of the delivery to the carrier. But, as no one had the authority to complete the instrument besides Goold, the paper could never acquire any value till it reached Goold's hands, that is, till the duty of the carrier was over. The value at the time of the delivery, was merely that of the paper; no value derived from the writing on it existed at that time. The supposed value is in the piece of paper *plus* the authority to do something to it which has not been done here. The piece of paper was sent by the carrier; the authority could not be sent: and neither of these elements apart from the other is sufficient to make the instrument of value. A similar reasoning was pursued in *Rex v. Clark*.¹ There are many cases in which a party to an incomplete instrument becomes liable upon the completion; *Schultz v. Astley*² is an instance, and represents a class of cases. But the liability never arises, and consequently the value of the instrument never is created, unless the completion is by an authorized party. Suppose this instrument to have been lost, no one except by means of forgery, or at least of some fraud, like that in *Regina v. White*,³ could make it valuable. If Goold had died during the transit, could his executors have completed the instrument? They could not. Whose name could they sign? If the carrier had lost the paper, could Goold have recovered the sum named in it by an action for damages against the carrier? He could not. And this shows that the object of the statute does not require the interpretation for which the defendants must contend; because, if the instrument be worthless, the carrier requires no protection from the consequences of its loss.

Decision.—*Ld. Campbell, C. J.*—I am of opinion that this rule ought to be discharged. The case of the defendants is clearly untenable unless this paper can be brought within Sect. 1 of the Carriers' Act, 11 G. 4 & 1 W. 4, c. 68. It

¹ *Russ & R.*, 181.

² *2 New Ca.*, 544.

³ *1 Den. Cr. C.*, 208.

must be shown to be a bill, order, note, or security for payment of money, or writing, of such value as to make up, with the 9/. 10s., more than 10/. It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be the bearer; that Cruttenden should become liable generally to the bearer was quite contrary to his intention. Nor is it a security for money; for we must look at the time of the delivery to the carrier; and at that time nothing could be claimed on it. I think it is a writing; it would be very difficult to define a writing so as not to include this paper. Then the question is as to the value. If this writing possesses any value beyond that of the paper material, that value must be 11/. 10s. Now can it be

What Constitutes a Signature—Who are Liable upon Negotiable Paper.—It is necessary to the validity of all these commercial contracts that the name of the party who is liable thereon should appear upon the face of the instrument. No person is liable as a party to a commercial contract whose signature does not appear upon it. It does not matter upon what portion of the instrument the name of the person who is to become liable thereon appears, so long as it was added *with the intention* to become liable. It is usual to place the signature at the lower right hand corner. This is not important, however. The name need not necessarily appear if it be indicated who the party is. The full name should be given; but this is not necessary absolutely—the initials simply will be sufficient. And it has been held that any mark which the party uses to indicate the intention to bind himself will be as effectual as his name. So also a note which reads “I, A. B., promise to pay, etc.,” is as good a commercial contract as if the note read “I promise to pay, etc.,” subscribed by “A. B.” *Brown v. Butcher’s Bank*, 6 Hill, 443, where the figures “1, 2, 8,” were held to take the place of the signature of the parties. *Taylor v. Dabbins*, 1 Strange, 399, where it is held that “I, A. B.,” will take the place of a signature if the contract is written by A. B. himself. *Sanders v. Anderson*, 21 Mo., 402, where it was held that a note signed “Steam Boat Ben Lee and owners” was a sufficient signature to bind the owners of the boat.

Where the note is signed by some mark or initials simply, which the party uses to indicate his intention to bind himself, it should be witnessed. This is not absolutely necessary, however. *Shank v. Butsch*, 28 Ind., 19; *Willoughby v. Moulton*, 47 N. H., 205; *Hilborn v. Alford*, 22 Cal., 482; *Flowers v. Billing*, 45 Ala., 488.

It frequently happens that a person carries on a business under an assumed or fictitious name in which case he will be liable

said that the writing bore that value at the time of its delivery to the carrier? I do not see that it was of intrinsic value to any person. It empowered a particular individual to claim to that amount, by putting his name to it; but that had not been in fact done by the individual, Goold. I cannot agree that the executors of Goold could have made it valuable by putting to it his name, or their own, or any name whatever. Nor could any one have bestowed value on it, who, not being contemplated by Cruttenden, had found it. It is therefore in accordance with all the authorities, to hold that this writing was of no value at the time of delivery to the carrier.

Wightman, J.—The question is whether that which beyond all doubt was a writing was, at the time of its delivery to upon commercial contracts executed and delivered in that name. Bartlett v. Tucker, 104 Mass., 336; Lockwood v. Coley, 22 Fed. Rep., 192.

By Whom Made.—The signature, however, need not be made by the party himself provided it is made by some one having authority. Woodbury v. Woodbury, 47 N. H., 11. The authority to execute and deliver commercial contracts for another may be either express or implied. Right, etc., v. First Nat. Bk., 42 Mich., 461.

Form of the Signature—It May be Written or Printed.—The signature may be written or printed; it may be in ink or in pencil. Pennington v. Baehr, 48 Cal., 565; Brown v. Butcher's Bank, 6 Hill, 443; Geary v. Physic, 5 Barn. & Cress., 234; Reed v. Rorak, 14 Tex., 329. When the signature is printed the holder must show that that particular signature has been adopted by the maker of the contract. Brown v. Butcher's, supra; Pennington v. Baehr, 48 Cal., 565.

Signature by Two or More Persons—Nature of Their Liability.—Of course two or more persons may join in the execution and delivery of commercial contracts, in which case their liability will be joint or joint and several depending altogether upon the language used in the contract. If two or more persons are named in the contract who are liable the presumption is that their liability is joint unless words of severance are used. Johnson v. King, 20 Ala., 270. If the contract reads "we promise" and signed by two or more persons their liability is joint; but if the contract reads "I promise, etc.," signed by two or more persons, their liability is joint and several, and they may be sued jointly or severally. Maiden v. Webster, 30 Ind., 317; Bill v. White, 52 Wis., 169. If the note reads "We or either of us promise to pay," it will be joint and several. First Nat. Bk. v. Fowler, 36 Ohio St., 524.

the carrier, of a value exceeding 10%. The fallacy of the argument lies in attempting to make the power of conferring the value at the end of the destined carriage the criterion of the value at the time of the delivery. I think the rule should be discharged.

Erle, J.—I am of the same opinion. This being an imperfect instrument, and not a complete bill, order, note, or security for money, but clearly a writing, we are not bound to say that, in point of law, it was of value. I use that expression, because it may be that, this being, except for the absence of the name of the drawer, an accepted bill of exchange, a jury may in a similar case find that the writing is of value; and I do not wish to preclude myself from considering whether such a finding might not be sustained.

RULE. Discharged.

Signature by Agent—His Liability.—An agent may have authority to execute and deliver negotiable contracts for his principal. If his signature is in the form "A." "agent," he alone is liable. He must use some word or words which are not *designatio personæ* simply, but which indicate that his act is for and on behalf of his principal, as "A" agent for "B" or "B" by "A," his agent, or "B" per "A" agent. *Owen v. Van Uster*, 20 L. J. Rep., 61; *O'Kell v. Charles*, 34 L. T. Rep., 422; *Bartlett v. Tucker*, 104 Mass., 336; *White v. Madison*, 26 N. Y., 117.

It is undoubtedly well settled that, where an *ordinary simple contract* is signed by an agent in his own name, with the addition of the word "agent" thereto, the principal may be made liable thereon, whether his (the principal's), name appears on the paper or not. *Story on Agency*, Sec. 160 *a*. But for commercial reasons, a distinction is made, between ordinary contracts and negotiable paper. As to negotiable contracts, the agent must either sign the name of the principal to the contract, or at least it must appear on the face of the paper itself, in some way, that it was drawn for him, or the principal will not be bound. *Edwards on Bills*, 80; *Andenton v. Shoup*, 17 Ohio St., 125; *Eastern R. R. Co. v. Benedict*, 5 Gray, 561; *Emly v. Lye*, 15 East, 7; *Becham v. Drake*, 9 M. & W., 92; *Dewitt v. Walton*, 5 Seld. (N. Y.), 571; *Sparks v. Dispatch Transfer Co.*, 104 Mo., 531.

Some courts have held where the commercial paper was signed by the officers of Banking Corporations as A. B., Cashier, or C. D., President, and where the name of the principal appears in the heading, that the principal was liable. *Chipman v. Foster*, 119 Mass., 198; *Hitchcock v. Buchanan*, 105 U. S., 416.

CHAPTER V.

Non-Essentials of Negotiable Contracts.

SECTION 21.

(1). NEGOTIABLE CONTRACTS NEED NOT BE DATED.

DE LA COURTIER *v.* BELLAMY.¹

IN THE COURT OF KING'S BENCH, MICHAELMAS TERM, 36 CHAS. II. (1683.)

[*Reported in 2 Showers 411.*]

The Form of Action.—Action on the case on a bill of exchange from parts beyond the seas, payable at double usance from the date thereof: custom alleged accordingly; and the fact was alleged to be, that the party beyond the sea drew such a bill such a day, and the same was afterward presented to, and accepted by the defendant.

And exception was taken, that the date of the bill was not set forth:

And per totam Curiam held, it was well enough, and they would intend it dated at the time of drawing it.

Judgment for the plaintiff.²

¹ This case is cited in Chitty on Bills, 148, 149, 563; Story on Bills of Exchange, 37; Wood's Byles on Bills and Notes, 142; Daniel on Negotiable Instruments, 66, 83; Tiedeman on Commercial Paper, 10; Randolph on Commercial Paper, 85, 88, 275, 342.

² In an action on a foreign bill of exchange, if the date be omitted, the court will intend it dated at the time it is stated to have been drawn.

In the case of *Hague v. French*, 3 B. & P., 173 (1802), it was argued that the action could not be sustained for the reason that the bill contained no date; the bill being payable at two months, without date, it was impossible to ascertain the time of payment. The court held that it might be intended that the date of the bill was the day of the drawing. The court in this case cited and approved the case of *De la Courtier v. Bellamy*. In the case of

Giles v. Bourne, 6 Maule & Selevin, 74 (1816), the case of Hague v. French, *supra*, was discussed and approved. See also Clark v. Sigourney, 17 Conn., 511; Woodford v. Dorwin, 3 Vt., 82; Mehlberg v. Tisher, 24 Wis., 607; Seldonridge v. Connable, 32 Ind., 375.

A Bill or Note Delivered Without Sum or Date.—
Authority to fill Such Blanks.—"An indorsement on a blank note, without sum or date or time of payment, will bind the indorser for any sum, payable at any time, which the person, to whom the indorser intrusts it, chooses to insert." *Mechanics and Farmers Bank v. Schuyler*, 7 Cow. (N. Y.), 337.

"Such a note is a letter of credit for an indefinite sum: *Russell v. Langstaffe*, Dougl., 514; 5 Cranch, 151; 2 M. & S., 90; 4 Mass. Rep., 54, 5. If there is an implied discretionary authority in such case to fill all the blanks, it would seem to follow that such an authority must equally exist to supply one, if only one be left. Accordingly, if the amount be left blank, any sum may be inserted; if the time of payment, it may be fixed at the pleasure of the holder, and in the hands of a *bona fide* indorsee the indorser cannot question the transaction, though the blanks may have been filled in a manner entirely different from the understanding and expectation of the indorser when he put his name upon the note."

"In the case of *M. & F. Bank v. Schuyler*, *supra*, it is said that the note in this case was perfect without a date. *It is true that the date is not essential to the validity of a bill or note; for where they have no date the time, if necessary, may be inquired into, and will be computed from the day they were issued:* 2 Ld. Raym., 1076; 2 Show, 422; Chitty on Bills, 78; 3 B. & P., 173; 2 John, 303; 13 East, 5. Nor is it necessary to the validity of a note that a time of payment should be expressed in it. If none be fixed it is payable on demand: Chitty on Bills, 79; 7 T. R., 427. But if a note is indorsed, perfect in every respect but the time of payment, and that is left blank, can there be any question of the authority of the maker, if the note be redelivered to him, to insert any time of payment he may think proper before he puts it in circulation? Can the indorser, in such a case, protect himself from liability on the ground of an alteration of the note? If not, upon what principle can the insertion of the date, where that is left blank, be considered an alteration? If it be conceded, as it must be, that the maker in this case had an implied authority to fill up the blank at all, the indorser, and not the innocent indorsee, must suffer the consequence of an abuse of that authority, if it has been abused. It is not, in judgment of law, an alteration of the note. The defendant must have contemplated the addition of the date before the note was to be passed, for it was payable at the Mechanics' and Farmers' Bank. It is believed to be the invariable custom of banks to discount paper without a date." *Mechanics, etc., Bank v. Schuyler*, *supra*.

Parol evidence is admissible to show from what time an undated instrument was intended to operate. *Davis v. Jones*, 17 C. B., 625. It may also be shown that there was a mistake in the date. *Drake v. Rogers*, 32 Me., 524; *Seldonridge v. Connable*, 32 Ind., 375; *Almich v. Downey*, 45 Minn., 460; *Germania Bank v. Distler*, 67 Barb., 333; *McSparran v. Neely*, 91 Pa. St., 17; *Giles v. Bourne*, 6 M. & S., 74.

Effect of Dating on Sunday.—A negotiable contract signed and delivered on Sunday, but bearing date on another day, is valid in the hands of a *bona fide* holder. *Love v. Wells*, 25 Ind., 503; *State Bank v. Thompson*, 42 N. H., 376; *Vinton v. Peck*, 15 Mich., 287. If in fact it is dated on Sunday but actually delivered on another day, it will be sustained. *Bank v. Mayberry*, 48 Me., 198; *King v. Fleming*, 72 Ill., 21; *Benson v. Drake*, 55 Me., 556. At common law there was no rule forbidding the execution and delivery of commercial contracts on Sunday.

Date—Where Placed.—It is customary to place the time or the date on which commercial contracts are executed and delivered at the upper right hand corner of the instrument. The date, however, is not essential to the validity of commercial contracts. *Michigan Ins. Co. v. Leavenworth*, 30 Vt., 11; *McSparran v. Neely*, 91 Pa. St., 17; *Mechanics, etc. Bank v. Schuyler*, 7 Cow., 337; *Mehlberg v. Fisher*, 24 Wis., 607. Where there is no date, the time, if necessary, may be inquired into and will be computed from the day they were issued. *Mechanics, etc. Bank v. Schuyler*, supra; *Lean v. Lozardi*, 27 Mich., 424. If the bill or note bears no date it will be considered as dated at the time it was made or at the time of its delivery. *Seldonridge v. Connable*, 32 Ind., 375. While the date is not essential to the validity of commercial contracts it may become a matter of importance. For instance where the note is payable “..... time after date,” or where they draw interest from date; or where the statute of limitations is interposed as a defense.

Ante-Dating and Post-Dating.—A commercial contract may be ante-dated or post-dated and parol evidence is admissible to show on what day such contract was actually delivered and it will take effect from that date; but such evidence will not be admitted, however, to invalidate the title of a *bona fide* holder. *McSparran v. Neely*, 91 Pa. St., 315; *Knox v. Clifford*, 38 Wis., 651; *Frazier v. Troy Printing Co.*, 24 Hun., 281; *Almich v. Downey*, 45 Minn., 460; 1 *Parsons on B. & N.*, 49. If by reason of the ante-dating or post-dating the contract should appear to have been executed and delivered at a time when by reason of, the date,—coverature, infancy,—or anything by reason of that date the contract is invalid it may be shown by parol evidence in behalf of any of the parties, that at the time of its actual date or delivery no such facts existed. *Story on Notes*, Sec. 48; *Daniel on Negot. Inst.*, Sec. 85; *Tied. on Com. Paper*, Sec. 11. Post-dating or ante-dating will not be

allowed when it is done for the purpose of evading rules of law which render contracts invalid. *Bailey v. Taber*, 5 Mass., 286; *Dan. on Com. Inst.*, Sec. 85. Ante-dating or post-dating does not vitiate the paper. *Burns v. Kohn & Furst*; *Brewster v. McCordel*, 8 Wend., 479; *Almich v. Downey*, 45 Minn., 460.

Mistake as to the Date.—Where a bill or note is intended to bear a date as of the time of its delivery, but by mistake another date is written on the face of the instrument, such mistake may be corrected, by parol, unless innocent indorsees or purchasers would be prejudiced thereby. 2 *Parsons Notes and Bills*, 574; *Brutt v. Picard, R. & M.*, 37. See *Miller v. Gilleland*, 19 Pa. St., 119, for the effect of such correction upon the rights and liabilities of sureties.

SECTION 22.

(2). NEGOTIABLE CONTRACTS NEED NOT CONTAIN A STATEMENT OF CONSIDERATION.

POPLEWELL v WILSON.¹

IN THE KING'S BENCH, HILARY TERM (6 GEO.), 1719.

[*Reported in 1 Strange, 263.*]

The Form of Action.—Error of a judgment in C. B., in case upon a promissory note entered into by A. to pay so much to B. for a debt due from C. to the said B. And it was objected,

¹This case is reported in Wood's Byles on Bills and Notes, 154, 219, 223; Story on Bills, 63, 183; Edwards on Negotiable Paper, 276; Tiedeman on Negotiable Paper, 31, 152, 170; Daniel on Negotiable Instruments, 108, 186; Ames on Bills and Notes, 635. See also upon the principal proposition:—2 Ld. Raym., 1481; Garnet v. Clark, 11 Mod., 226; Smith v. Knox, 3 Espinasse, 46; Buchanan v. Bank, 78 Ill., 500; Grant v. Ellicott, 7 Wend., 227; Brown v. Mott, 7 Johnson, 361; Brix v. Braham, 1 Bingham, 281; 2 Black. Com., 446.

The General Rule—Consideration Presumed In Commercial Contracts.—It may be stated as a general rule that a bill of exchange or a promissory note imports a consideration whether it is negotiable or not. In the case of *Carnwright v. Gray*, 127 N. Y., 92, the following instrument was held to be a good negotiable contract without words of "negotiability" or a statement of "consideration":

"Quarryville, Sept. 2, 1871.

"Thirty days after death, I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest.

Samuel P. Freligh."

In this case the defendant moved to dismiss, upon the ground that no proof had been given that the instrument sued upon had any consideration. This motion was denied, and the court instructed the jury that the instrument was a promissory note and therefore a consideration was imported, and that the burden rested upon the defendant to show that it was without a consideration. *Downing v. Backinstoes*, 3 Caines, 137; *President v. Hurin*, 9 Johnson, 217; 6 Am. Dec., 273; *Kimball v. Huntington*, 10 Wend., 675; 25 Am. Dec., 590; *Hatch v. Traves*, 11 Ad. & E., 702; *Hall v. Farmer*, 5 Denio, 484; *Siegel v. Chicago, etc. Savings Bank*, 131 Ill., 569. In this last case the consideration was executory and was supported. 19 Am. St. Rep., 51; *Davis v. McCready*, 17 N. Y., 230; *State Nat. Bank v. Cason*, 39 La. Ann., 865; *McGowen*

that this note not being for value received, it was not within

v. West, 7 Mo., 569; 38 Am. Dec., 468; Chapman v. Remington, 80 Mich., 552; County, etc. v. Auckley, 90 Mo., 126.

Where no consideration is recited, extrinsic evidence is admissible to show that there was a consideration *between the original parties*. Green v. Shepherd, 5 Allen, 589; Martin v. Stubbings, 126 Ill., 387; 9 Am. St. Rep., 620. See also, as between the original parties, may a different consideration be proved than that expressed. Miller v. McKenzie, 95 N. Y., 575; Johnson v. Sutherland, 39 Mich., 579; Everhart v. Puckett, 73 Ind., 409.

The Use of the Phrase "Value Received."—Necessity of.—The words for "value received" are almost universally inserted in bills and notes, but it is in no wise necessary to do so. Dean v. Carruth, 108 Mass., 242; Grant v. DaCosta, 3 M. & S., 351; 4 Douglass, 427; Benjamin v. Fillman, 2 McLean (U. S.), 213; Townsend v. Derby, 3 Metc. (Mass.), 363; Bourne v. Ward, 51 Me., 191. There are some old cases which hold that words expressing a consideration are as necessary in these contracts as they are in common law contracts. Cramlington v. Evans, 1 Showers, 5. As between the *original* parties the consideration may always be inquired into; and if it is shown that there was no consideration, or that it has failed, a recovery will be defeated. Rice v. Howland, 147 Mass., 407; Monson v. Tripp, 81 Me., 24; Cooper v. King, 73 Iowa, 136; Chenault v. Bush, 84 Ky., 528; Slade v. Halsted, 7 Cow., 322; Collis v. Emmett, 1 H. Blk., 313; Molloy v. Delves, 7 Bing., 428; 5 M. & P., 275; 4 C. & P., 492 (19 E. C. L.) And where the actual consideration between the original parties is less than the amount of the bill or note, no recovery can be had beyond the real consideration. Brown v. Mott, 7 Johns. (N. Y.), 361. A different rule obtains, however, where the instrument gets into the hands of an innocent third party. In this case the question of consideration between the original parties cannot be raised, provided he secured it before maturity, for value, in the due course of business and without knowledge of any equities existing against it.

Effect of a Failure in the Consideration.—A want or failure of consideration will, as between the original parties, or persons standing in no better situation, defeat a commercial contract in the same manner as other contracts, even though it is expressed to be for "value received;" Thatcher v. Densmore, 5 Mass., 299; Parish v. Stone, 14 Pick., 198; Stevens v. McIntire, 14 Me., 14. In an action upon these contracts the *onus probandi* lies on the defendant and the holder is not bound to prove that he gave value until the defendant has first made out a case showing:

1. That the plaintiff is not a *bona fide* holder; or
2. That there was fraud in the inception of the contract; or
3. That there was suspicion of fraud which would make him guilty of bad faith. Jennison v. Stafford, 1 Cush., 168, 170; Saw-

the statute, and *prima facie* the debt of another and is no consideration to raise a promise.

yer v. Vaughn, 25 Me., 337, 339; Lewis v. Parker, 4 Ad. & El., 838; Collins v. Martin, 1 B. & P., 651; Hayly v. Lane, 2 Atk., 182; Lickbarrow v. Mason, 2 T. R., 71; Ford v. Beech, 11 Adolph. & E., 854.

What Consideration will Support a Negotiable Contract.—Love and Affection not Sufficient.—As between the original parties the rule relating to consideration in common law contracts applies to negotiable contracts. A valuable consideration is necessary; a good consideration will not support these contracts. In an action upon the following note:

“ Pleasant Valley, Ill., Oct., 25th, 1875.

“ Whereas, my niece, Lillie Williams, has performed for me personal services for a long period of time, for which I desire shall receive ample compensation from my estate, and feeling able at present to fully compensate her, I therefore and hereby acknowledge myself indebted to her in the sum of \$2,500, with interest, but not to be due until my death, unless at my option.

Delilah Deeds.”

Scholfield, C. J., said: “ A note executed without any other consideration than that of *natural affection*, or one without any valuable consideration, *intended as a mere gift*, cannot form the ground of recovery in an action at law. A gift is always revocable until it is executed; and a promissory note, intended purely as a gift, is but a promise to make a gift in the future. The gift is not executed until the note is paid. Kirkpatrick v. Taylor, 43 Ill., 207; Blanchard v. Williamson, 70 Ill., 647; Pratt v. Trustees, 93 Ill., 475. It is not pertinent for us here to inquire how slight a valuable consideration would support this promise, for the appellate court finds as a matter of fact that it is supported by no valuable consideration,—that the promise is to make a gift only.” Williams v. Forbes, 114 Ill., 167; 28 N. E. Rep., 463. A negotiable contract, executed and delivered as a gift to a son or other relation, is not sufficient to support it. Fisk v. Cox, 18 Johns, 145; Blogg v. Pinkers, 1 Ryan. & Mood., 125. While some cases have attempted to hold that this was a good consideration, [Tate v. Hilbert, 2 Ves. Jr., 111; Seton v. Seton, 2 Bro. Ch., 610; Dawson v. Kearton, 25 L. J. Ch., 166], the rule seems well settled now that a promissory note is ineffectual to perfect a gift either “*inter vivos*” or “*causa mortis*.” Williams v. Forbes, *supra*; Fink v. Cox, 18 Johns., 145; Richardson v. Richardson, 148 Ill., 563; Shaw v. Camp, 160 Ill., 425; Voorhees v. Combs, 33 N. J. L., 494; Pope v. Dodson, 58 Ill., 360, (gift *inter vivos*); Raymond v. Sellick, 10 Conn., 480, (gift *causa mortis*); Parish v. Stone, 14 Pick., 198; Second Nat. Bk. v. Williams, 13 Mich., 282.

Decision.—But the court held it to be within the statute,

In the case of *Rice v. Rice*, 68 Ala., 216, it was held that the “presumption of consideration” fails in a negotiable contract when it shows on its face that it was given for the purpose of a gift.

Money Consideration—Consideration Other Than Money—Total or Partial Failure of Consideration.—There is a distinction between a *money* consideration and a *valuable* consideration other than money. In the latter the *slightest* consideration will support the promise to the full extent, while the former will only support the promise to the extent of the *money* forming the consideration.

In the case of *Sawyer v. McLough* (46 Barb., 350), the action was brought to recover the amount of a note without date, but proved to have been given by Joseph Sawyer, the defendant’s intestate, in June or July, 1861. The note was in the following words and figures:

“For value received, I promise to pay I. M. Sawyer, if living, if not, to his son Joseph Sawyer, fifteen hundred dollars, on the first of October, 1862.”
Joseph Sawyer.”

Upon the trial at the Ontario circuit, in May, 1865, the plaintiff gave evidence tending to show the execution of the note by the testator, by proving the signature to be genuine, and by the testimony of Edward S. Gray, who testified that he was present and saw the testator sign the note, and deliver it to the plaintiff. He further testified that on the occasion of the execution of the note, the plaintiff handed the testator, his father, a roll of bills, who took it, and looked it over, and said it was all right, and then handed the plaintiff the note; that the witness did not count the roll of bills; that he saw the intestate count it; that there was nothing said as to the amount, and the witness had no knowledge as to the amount; that he did not see the denomination of any of the bills; that he saw the size of the roll; that it was rolled up; that he could not tell as to the amount; that the plaintiff handed it to the testator, and asked him if it was all right, and he said he believed it was.

There was no evidence showing that the amount of the money paid or delivered by the plaintiff to the testator, on the occasion of giving the note, except what might be implied or inferred from the amount of the note, and the fact that the giving the note and the payment of the money were concurrent acts, and one and the same transaction.

The theory of the defense was, “that if the money so handed to the testator was the only valuable consideration of the note, and of less amount than the note, the plaintiff could recover nothing beyond the amount of such money consideration.”

It was contended on the argument, in behalf of the defend-

being an absolute promise, and every way as negotiable as if

ants, that there was a distinction between a *valuable* consideration other than money and a *money* consideration; that while in the former case the slightest consideration would support a promise to pay the largest amount, to the full extent of the promise, in the latter the consideration will support a promise only to the extent of the money forming the consideration; that this leaves the *measure* of the value of a valuable consideration, other than money, for a promise to pay money, to the parties to the contract; but money, being the standard of value, is not subject to be changed by contract, and will support a promise to pay money, only to the amount of the consideration. It seems to me this is a correct statement of the law on the subject.

Judge Story, in his treatise on promissory notes, states the law as follows: "The objection to a note may be, that there is a total want of consideration to support it; or that there is only a partial want of consideration. In the first case it goes to the entire validity of the note, and avoids it. In the latter case it affects the note with nullity, only *pro tanto*. The same rule applies to cases where there was originally no want of consideration, but there has been a subsequent failure thereof, either in whole or in part. For a subsequent failure of the consideration is equally fatal with an original want of consideration, not indeed in all cases, but in many cases; at least where it is a matter capable of definite computation, and not mere unliquidated damages." Story, Prom. Notes, § 187.

It was not necessary for the plaintiff to prove any consideration for the note, as it imported a sufficient consideration; and if it was inadequate or illegal for any reason, or had failed in whole or in part, it was incumbent upon the defendants to prove it. The testimony of the witness Gray did not tend to prove inadequacy of consideration, and there was no other evidence in the case which would authorize the jury in finding an inadequate consideration. Gray's testimony on that subject was given on cross-examination, and was an attempt on the part of the defendants to prove such inadequacy, but which attempt was an entire failure. It proved that, when the note was made and delivered by the intestate to the plaintiff, the latter handed the former money, the amount of which the witness did not know; but, after the testator had counted it, he said it was all right; that the testator executed and delivered the note to the plaintiff was put beyond a doubt, and the testimony of Gray, as before stated, did not tend to prove that the money paid was less than the amount of the note. There was no evidence to contradict the testimony of Gray, and upon that, if believed, the legal presumption was that the money advanced by the plaintiff was equal to the amount secured by the note; and until that presumption was rebutted, the jury would be bound so to find.

it had been generally for value received. And the judgment was affirmed.

Pre-existing Debt as a Consideration for a Commercial Contract.—The weight of authority now clearly supports the rule, that one who takes negotiable paper in payment of an antecedent or pre-existing debt, before maturity, and without notice, actual or otherwise, of any defects, thereby receives it in due course of business and becomes a holder for value. *Swift v. Tyson*, 16 Pet. (U. S.), 1 (1842); *Poirier v. Norris*, 2 E. & B. (75 E. C. L.), 89; *Bank v. Gilliland*, 23 Wend., 311 (1840); *First Nat. Bk. v. McAllister*, 46 Mich., 397; *Merchants Ins. Co. v. Abbott*, 131 Mass., 397; *Evans v. Speer Hardware Co.*, 45 S. W. Rep., 370 (1898), (Ark.); *Phoenix Ins. Co. v. Church*, 81 N. Y., 225; *Mix v. Nat. Bk.*, 91 Ill., 20; *Bardsley v. Deep*, 88 Pa. St., 420. The antecedent debt must, however, be cancelled by the bill or note when given and accepted. *Mix v. Nat. Bank*, *supra*; *Carlisle v. Wishart*, 11 Ohio St., 172. If the commercial contract is given as a conditional and not an absolute payment of the pre-existing debt then it will not be a good and valuable consideration. See the leading case contrary to this general doctrine. *Bay v. Coddington*, 5 Johnson's Ch., 54; *Coddington v. Bay*, 20 Johnson, 637.

SECTION 23

(c) NEGOTIABLE CONTRACTS NEED NOT STIPULATE A PLACE OF PAYMENT.

There is no requirement that the *place* of payment of commercial contracts shall be expressly named upon its face. *Mehlberg v. Tisher*, 24 Wis., 607; *Malden Bk. v. Baldwin*, 13 Gray (Mass.), 154. In the absence of a place of payment named there is a presumption that it is payable at the place of execution. The place of payment may also be in the alternative. *Pollard v. Herries*, 3 B. and P. (1791), 335. If no place of execution, however, is named there is a presumption that it is payable at the place of business or residence of the maker. *McCruden v. Jonas*, 173 Pa. St., 507. It has been held that if no particular place of payment is specified in a commercial contract, the law of the place where it is made determines, not only its construction, but also the obligation and duty it imposes upon the maker. *Barrett v. Dodge*, 16 R. I., 740; 37 Am. St. R., 777. In some of the states, however, the law of the place of payment and not the place of execution governs in its construction as well as the obligation and duty it imposes upon the maker. *Dan. on Negot. Inst.*, Sec. 90 *a*. The contract may provide, however, whether it is to be construed by the laws of the state where made or by the rules of the place where it is to be executed. *New England, etc. Co. v. McLaughlin*, 87 Ga., 1. If no place of payment is named in a note, the place of payment is understood to be where the maker resides; and if a bill, then at the place where the drawee resides.

While there is no requirement that a "place" of execution or performance shall be named in a commercial contract, yet it may become a question of a good deal of importance in the construction, interest, liability of parties, time and place of presentment for payment or acceptance, etc. These questions will be discussed under their respective heads.

SECTION 24.

(d). A COMMERCIAL CONTRACT NEED NOT CONTAIN THE INDICIA OF NEGOTIABILITY.KENDALL ET AL. v. GALVIN.¹

IN THE SUPREME COURT, MAINE, JUNE, 1838.

[Reported in 15 Maine, 131.]

The Form of Action.—The action was assumpsit, on an account, charging the amount paid N. K. Seaton on the defendant's order. The declaration also contained the money counts. On the trial the plaintiffs offered in evidence a paper, of which the following is a copy:

“Messrs. Kendall & Kingsbury, Gents.—Please pay N. K. Seaton four hundred fifty-five dollars, thirty-six cents, and charge the same to my account.

“Calais, June 7, 1830. Geo. I. Galvin.”

The plaintiffs also proved by Seaton the acceptance and payment of the order or bill by them. The defendant's counsel contended, that the plaintiffs had not entitled themselves to recover, and requested the judge to instruct the jury that the acceptance and payment of the order, by the plaintiffs was *prima facie* evidence of funds of the defendant in their hands, and that it was incumbent on the plaintiffs to rebut that presumption to entitle them to recover. The Judge refused to give this instruction, and did instruct them, that if the plaintiffs have shown an order drawn by the defendant on them, and that they accepted and paid it, that makes out their case; that the plaintiffs were not bound to show that they had not funds of the defendant in their hands; and that if Galvin had funds in their hands, it was competent for him to show it. The verdict was for the plaintiffs, and the defendant excepted.

Claim of Defendant.—It was argued for the defendant that the instrument relied on was a bill of exchange.² The

¹ This case is cited in Daniel on Negotiable Instruments, 88, 108; Wood's Byles on Bills and Notes, 155, 604. See also Mehlburg v. Tisher, 24 Wis., 607.

² Chitty on Bills, 1, 50; Bayley on Bills, 1.

acceptance of a bill of exchange is *prima facie* evidence of effects of the drawer in the hands of the acceptor.¹ Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it.² And in an action for money paid, the acceptor must prove such facts as he ought to state in the special count.³

Claim of Plaintiff.—The plaintiff, contended that this was a mere order, or request to pay a sum of money for the defendants, and not a bill of exchange. It wants the essential requisities of a bill:

1st. In not being payable to order or bearer.

2d. It does not appear to be for value received.

3rd. No time is fixed for the payment.

4th. It is not made payable at any particular place, nor is even the residence of the party on whom the order is drawn stated. The law does not require the negative to be proved, and yet the defendant's case requires it.⁴

Decision.—The acceptance of a bill of exchange by the drawee, is presumptive evidence that he had effects of the drawer in his hands. It is so stated by the elementary writers upon bills, and the authorities authorize it.⁵

Whether the instructions given were correct must depend, therefore, upon the instrument offered in evidence by the plaintiffs. If it is to be regarded as a bill of exchange, the instructions were erroneous, because no testimony was offered to rebut this presumption at law. If it can be regarded as an order or request to pay money, and not a bill of exchange, and so not within the rule applicable to them, then the instructions were correct.

No precise form of words are necessary in a bill of exchange.⁶ There are certain essential requisities; such as, that it be payable at all events, not on a contingency, not out of a

¹ Chitty on Bills, 365, 410; 3 T. R., 183; 1 Wilson, 185; 2 Stark. Ev., 276.

² 2 Harrison's Dig., 1115; 3 East, 192; 3 Campb., 10; Varrill v. Heald, 2 Greenl., 91; 2 Stark. Ev., 276; Chitty on Bills, 399.

³ Bayley on Bills, 312.

⁴ Chitty on Bills, 212; note 1.

⁵ 2 Stark Ev., 167, 8; Vere v. Lewis, 3 T. R., 183.

⁶ Morris v. Lee, Ld. Ray., 1396.

CHAPTER VI.

Acceptance.

SECTION 25.

THE DRAWEE OF A BILL OF EXCHANGE IS NOT LIABLE THEREON UNTIL HE HAS ACCEPTED THE SAME.

SWOPE *v.* ROSS ET AL.¹

IN THE SUPREME COURT OF PENNSYLVANIA, JULY 25, 1861.

[*Reported in 40 Pa. St., 186; 80 Am. D., 567.*]

The Form of Action.—This was an action of assumpsit in the Common Pleas, entered February Term, 1860, between George Ross & Co., plaintiffs, and Swope & Karns, in which the following case was stated for the opinion of the court in the nature of a special verdict.

Ross Forward gave to Swope & Karns the following instrument of writing:

“\$616.00. “*Scmerset, Pa., August 18th, 1859.*

“*George Ross & Co., Bankers, pay to Swope & Karns, or order, ninety days from date, six hundred and sixteen dollars.*”
Ross Forward.”

On or about the 1st of September thereafter, Swope, one of the firm of Swope & Karns, delivered this paper (indorsed Swope & Karns) to the plaintiff's bank, had the same discounted, and received the money thereon less the discount, \$16.40.

At the time this check was given, and when it was discounted at the bank, Ross Forward was one of the firm of George Ross & Co., but went out on the 19th of September, 1859.

¹ This case is cited in Daniel on Negotiable Instruments, 480, 501; Wood's Byles on B. & N., 406; Bigelow on B. & N., 42, 243; Bigelow's Cases on B. & N., 361; Norton on B. & N., 81, 84, 281; Benjamin's Chalmers Bills of Exchange and Promissory Notes, 44, 53, 233.

When the day of payment named in the check came round, Forward had no funds in the bank, and the paper was regularly protested for non-payment on the 19th of November, 1859.

If the court be of the opinion that on the above state of facts the plaintiffs are entitled to recover, the judgment to be entered in favor of plaintiffs for \$616, with interest from November 19th, 1859; otherwise judgment for defendant with costs. Notice of dishonor of the bill was admitted in the argument. The court below entered judgment for plaintiffs for \$616, with interest from November 19th, 1859.

Argument of Plaintiff.—The plaintiffs in error, argued that the drawee of a check, payable in the future, who discounts it to the payee before it is payable, is not entitled to recover the money from the payee on account of the insolvency of the drawer. A check is, in form and effect, a bill of exchange. If George Ross & Co. had accepted this check, their liability to pay at maturity would not be questioned, whether the drawee had funds or not; the acceptor being the principal debtor.¹

Payment before maturity is equally conclusive, and the bank can only resort to Forward for reimbursement.

As the check was to the order of Swope & Karns, their indorsement was necessary, of course, and would have been so if it were payable on demand.

If they had received the money on this from any other party than the drawee, their endorsement would have made them liable on failure of payment by the drawee; but here the drawee pays the money according to the request of the drawer, and receives from the holder \$16.40 for present payment. Besides, the drawer was a member of the firm of George Ross & Co., the drawees, so that the doctrine of the court below is, that a man may draw a check on himself, payable in future, speculate on it before maturity, and, on his insolvency, compel the payee to refund the whole amount.

Argument of Defendant.—The paper in controversy, not being due, was not presented, for payment, nor did the plaintiffs agree to accept it to be paid when due, but they did

¹ 3 Kent., 85.

agree to discount it on defendant's endorsement, as other undue paper is discounted. This indorsement by plaintiff, without acceptance, waived the acceptance, and guaranteed the other member of the firm of George Ross & Co., that Forward would pay it at maturity, which having failed to do, the indorsees become liable.

Although a check is in effect a bill of exchange, it is also true that bills payable to order are negotiable; and a transfer by indorsement is similar to making a new bill, the indorser being a new drawer.¹ A blank indorsement is an equivocal fact, and it is in the power of the holder to use it as an acquittance to discharge the bill, or as an assignment to charge the indorser.²

It was not a payment of their own paper. Forward, though a member of the firm of Ross & Co., was as much a stranger in this transaction as any other person.

Decision.—The question presented by the case stated is quite novel, and we have not been able to find that it has been adjudicated. Undoubtedly the acceptor of a bill of exchange is the principal debtor, and the drawer and indorsers are but sureties. Of course the acceptor, even after payment, cannot sue either the drawer or indorser of the bill unless his acceptance was *supra protest*. His payment of the bill extinguishes it; but the case stated finds that the plaintiffs discounted the bill for the payees before it became payable, not that they accepted it or paid it. Discounting a bill, though it be done by the drawee, is neither acceptance nor payment. *Acceptance is an engagement to pay the bill according to its tenor and effect when it becomes due.* A bill is paid only when there is an intention to discharge and satisfy it. In *Burbidge v. Manners*,³ Ld. Ellenborough said "that even payment of a bill before it became due, does not extinguish it any more than if it were merely discounted," and added that "payment means payment in due course and not by anticipation." His lordship evidently thought that dis-

¹ 1 Wheaton's Selwyn, 285.

² 2 Id., 287.

³ 3 Camp., 194.

counting a bill by a drawee is neither payment nor extinguishment.

In *Attenborough v. McKenzie*,¹ in the English Court of Exchequer, it was held that if the acceptor of a bill discounts it, he may reissue it so as to charge the drawer; that nothing will discharge the drawer but payment, *i. e.*, payment when due, or payment for the purpose of discharging and satisfying the bill. Therefore if the acceptor discounts the bill for the drawer and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although, at the time, the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount less the discount, be deemed a payment of the bill by the acceptor. In that case the holder of the bill took it by indorsement after it was due, from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it. It also decides that he does take it as an indorsee when he discounts it. Can then the drawee of a bill, payable on time, who has discounted it, maintain an action on it against the drawer or indorser if it be protested for non-payment and notice be given? *He is not a party to the bill until he has accepted it. Until then, he has not assumed the position of principal debtor, nor undertaken any obligation in regard to it. His discounting has neither paid nor extinguished it, and it is not a promise to pay according to its tenor and effect.* Is he precluded from becoming an indorser by the fact that the bill was directed to him?

The Drawee May Become an Indorser.—It seems well settled that the drawee of a bill may accept or pay it, *supra protest*, for honor of the drawer or indorser, and if he takes it up he stands in the position of an indorsee paying full value for it, has the same remedies to which an indorsee would be entitled against all prior parties, and can of course sue the drawer or prior indorsers.² In such cases the fact that the

¹ 36 Eng. Law and Eq., 562.

² Chitty on Bills, 375.

bill was drawn upon him does not incapacitate him from acquiring the rights of an indorsee. No reason is apparent for a different rule where the drawee becomes the holder by discounting the bill before its dishonor. Uncertain whether the drawer will put funds into his hands to meet the bill at maturity, he may well refuse to accept, and yet may discount it on the credit of both drawer and indorser. If he does not accept he is as much a stranger to it as any other person discounting it for the drawer or indorser. He is but purchasing the contract, and the contract thus purchased is that the drawee will pay the bill on presentment, when it shall fall due, or in case of his failing to do so, that the parties whose names are already upon it will pay, if due notice of its dishonor be given to them. The promise is made by the parties to the bill. The purchaser enters into no engagement.

These views accord with the doctrine laid down in *Desha Shephard & Co. v. Steward*,² a case which more closely resem-

² 6 Alabama, 852.

Acceptance Defined.—An acceptance is the act, by which the person, on whom a bill of exchange is drawn, gives his assent to comply with the request of the drawer. In other words *an acceptance is an undertaking by the drawee of a bill of exchange to pay the same according to its terms.* 2 Bl. Com., 469; *Swope v. Ross*, 40 Pa. St., 186; *Norton on Bills and Notes*, 80; *Ellison v. Collingridge*, 9 B. and C., 570. It has also been defined “*as a promise to pay a bill of exchange in money when due.*” *Gallagher v. Nicholas*, 60 N. Y., 438 (1875); *Ray v. Faulkner*, 73 Ill., 469 (1874); *Bonnell v. Mawha*, 8 Vt., 200; *Spear v. Pratt*, 2 Hill (N. Y.), 582.

Form of an Acceptance.—There is no particular form required for an acceptance under the law merchant. No form of words were necessary under the *Lex Mercatoria* to constitute a valid acceptance of a bill of exchange. It was sufficient if the drawee, in fact, undertook or promised to pay the bill, by any form of expression. *Coffman v. Campbell*, 87 Ill., 98; *Espy v. Cincinnati First Nat. Bk.*, 18 Wall., 604.

(a). **May be by Parol or in Writing.**—Under the law merchant an acceptance might be either by parol or in writing; and it might be upon a separate piece of paper even. *Sturges v. Fourth Nat. Bk.*, 75 Ill., 595; *Wilden v. Merchant's Bank*, 64 Ala., 1; *Miller v. Neihaus*, 51 Ind., 401. Many of the states now require acceptance to be in writing. See statutes of your state.

(b.) **May be of a Bill not yet Drawn.**—So also might there

bles the present than any case we have been able to find. In it the Supreme Court of that state ruled that the drawees of a bill may sue the drawer or indorsers after it has been dishonored, even though they obtained the bill before its dis-

be an acceptance of a bill not yet drawn, and this acceptance might be either by parol or in writing; and the acceptance would be binding even though the exact amount of the bill and the time for payment have not been fixed. *Parker v. Greele*, 2 Wend., 545; *Kennedy v. Geddes*, 3 Ala., 581; *Bank of Michigan v. Ely*, 17 Wend., 508; *Coolidge v. Payson*, 2 Wheat., 66; *Jones v. Council Bluffs Bank*, 34 Ill., 313; *Burns v. Rolland*, 40 Barb., 368; *Bank of Rutland v. Woodruff*, 34 Vt., 89; *Mason v. Dousay*, 35 Ill., 424; *Sturges v. Fourth Nat. Bk.*, 75 Ill., 395; *Hall v. First Nat. Bk.* A promise to accept a bill not yet drawn may operate as an acceptance if the bill is drawn within a reasonable time, and this is true not only as to the drawer, but as to every party who takes the bill on the faith of such promise. *Plumer v. Lyman*, 49 Me., 229; *Stevman v. Harrison*, 42 Pa. St., 49; *Riggs v. Linsay*, 7 Cranch, 500; *McEvers v. Mason*, 10 Johns., 207. It has been held that an authority to draw a bill of exchange if the same is particularly described, implies a promise to accept. This authority must be strictly complied with, however, and be acted upon within a reasonable time. *Ulster Bank v. McFarlan*, 3 Den. (N. Y.), 553; *Naglee v. Lyman*, 14 Cal., 450; *Beech v. State Bank*, 2 Ind., 488; *Gates v. Parker*, 43 Me., 544; *Burns v. Rowland*, 40 Barb., 368; *Spalding v. Andrews*, 48 Pa. St., 411. Upon the question whether there may be a parol acceptance of a future bill, there is some conflict of authority. *Kennedy v. Geddes*, 8 Port (Ala.), 263; *Mercantile Bank v. Cox*, 38 Me., 500; *Plumer v. Lyman*, 49 Me., 229; *Spalding v. Andrews*, 48 Pa. St., 411.

(c.) **May be by Telegram.**—An acceptance may also be by telegraph. *In re Armstrong*, 41 Fed. Rep., 381; *North Atchison Bank v. Garreston*, 51 Fed. Rep., 168; *Spalding v. Andrews*, 48 Pa. St., 411.

(d.) **May be Implied from the Detention or Destruction of a Bill.**—An acceptance of a bill of exchange may be implied from acts, such as the detention for a long time, contrary to the usage of the parties under such circumstances as to give credit to the bill. *Dunavan v. Flynn*, 118 Mass., 537; *Storer v. Logan*, 9 Mass., 55, 60; *Rousch v. Duff*, 35 Mo., 312. Whether a detention of the bill will amount to an acceptance or not, must depend upon the circumstances of the case. A mere *detention* of the bill by the drawee will not amount to an acceptance. *Mason v. Barff*, 2 B. & Ald., 26. If the bill is detained by the drawee for more than twenty-four hours, or for a period long enough to enable the drawee to ascertain the state of the account between he and the drawer, the better doctrine is that such detention should be treated

honor; and that until acceptance they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. It was said that there is no legal presumption if the drawee comes into possession of the bill

as a non acceptance of the bill and should be protested, when necessary. When the holder leaves a bill with the drawee for acceptance, and it is his duty to call for it within a reasonable time, for the purpose of ascertaining whether it has been accepted or not, the detention, of course, will not amount to an acceptance. *Jeune v. Ward*, 2 Starkie, 326. If the drawee, however, retains the bill and does not notify the holder of his intention to accept it or not, and subsequently destroys it, he will be liable as an acceptor. *Jeune v. Ward*, supra; *Matteson v. Moulton*, 11 Hun., 268. Mr. Daniel, in his valuable work on Negotiable Instruments, says. "As a general rule, the mere detention for an unreasonable time is not considered as amounting to an acceptance." Daniel on Negotiable Instruments, Sec. 499a. This, of course, must depend upon the circumstances in the particular case or upon the custom of the parties. The better doctrine seems to be, in the absence of any understanding, that if the drawee detains the bill for more than 24 hours, without indicating his intention to accept, he should be treated as having refused acceptance and due notice should be given to the drawer. *Bank v. Bank*, 8 Barb., 396; 7 N. Y., 459; Daniel on Negotiable Instruments, Sec. 492.

(e.) A Promise to Pay Amounts to an Acceptance.—

It has been held that a promise to pay a bill at maturity amounts to an acceptance. *Spaulding v. Andrews*, 12 Wright, 411. So also has, the authority "to draw" a bill of exchange with a promise to pay the same, been held to be an implied acceptance.

(f.) May be Upon the Bill or Upon a Separate Paper.—

The acceptance may be written upon the bill itself, either upon its back or upon its face, or it may be upon a separate piece of paper. If upon a separate piece of paper, the language indicating the acceptance must be clear and unequivocal and should clearly point out the particular instrument accepted.

(g.) Need Not be Dated.—The acceptance need not be dated. It may be before it has been signed by the drawer or afterward. It may be before or after maturity. It may also be before or after dishonor. The drawee may accept it after he has once refused to accept or pay the same.

(h.) Need Not be Accepted When Drawer and Drawee are the Same Person, Corporation, or Partnership.—No formal *acceptance* of a bill of exchange drawn, by a *person* or *corporation* upon himself or itself, is necessary, the act of drawing being deemed an acceptance. *Hasey v. White Pigeon Co.*, 1 Doug. (Mich.), 193. So also will the act of drawing a bill by one partner, in his own name, on the firm of which he is a mem-

previous to its dishonor, that he takes it with the obligation to accept.

Such being in our opinion the law, it was not error that

ber, for the use of the partnership, in law amount to an acceptance by the drawer in behalf of the firm. *Dougal v. Chowles*, 5 Day (Conn.), 511.

(i.) **Some States Require the Acceptance to be in Writing.**—At common law the acceptance might be either by parol or in writing, but many of the states have by statute provided that no acceptance shall be good unless the same shall be reduced to writing. It has been held that an acceptance may be made by telegram and that this form of acceptance is sufficient to comply with the statutes requiring the acceptance to be in writing; a telegram standing upon the same footing as a letter. *Central Savings Bank v. Richards*, 109 Mass., 414; *Nevada Bank v. Luce*, 139 Mass., 488; *Coffman v. Campbell*, 87 Ill., 98; *Lindley v. First Nat. Bk.*, 76 Iowa, 630; *Brinkman v. Hunter*, 73 Mo., 172; *First Nat. Bank v. Clark*, 61 Md., 401; *Molson's Bank v. Howard*, 40 N. Y. Sup. Ct., 15.

(j.) **The General Method of Acceptance.**—The usual mode of making an acceptance is by writing the word "accepted" upon the face of the bill and subscribing the drawee's signature. If it is payable after sight, the date of the acceptance should be given also. It has been held that the drawee's name alone, written upon the face or any part of the bill, would be a sufficient acceptance; so also has the word "accepted," "presented," "seen," "honored," or a direction to a third person to pay, or the day of the month, or "I will pay this bill," have all been held to be a good acceptance even though such statement was not signed. *Powell v. Monnier*, 1 Atk., 611; *Dufaur v. Oxenden*, 1 M. & R., 90; *Spear v. Pratt*, 2 Hill, 582; *Ward v. Allen*, 2 Metc. (Mass.), 53; *Cook v. Baldwin*, 120 Mass., 317, where the signed statement "I take notice of the above," was held to be an acceptance; *Brannin v. Henderson*, 12 B. Mon. (Ky.), 61, where "I will see the within paid eventually," was held to be a good acceptance. Any statement or the use of any form of words, from which an intention to accept can be inferred, will amount to an acceptance.

What Bills Must be Presented for Acceptance.—✓
All bills of exchange need not be presented for acceptance. None need be presented for acceptance unless they are payable after sight or a certain number of days after demand. All bills of exchange *may* be presented for acceptance unless they are payable at sight. The holder can not look to the drawer for reimbursement until after the bill has been presented for acceptance or payment to the drawee unless such presentment has been excused.

The Liability of the Drawer.—The drawer's liability is a conditional one, depending:

the Court of Common Pleas gave judgment for the plaintiff upon the case stated. The fact is not distinctly found that notice of dishonor of the bill was duly given to the defendants.

1st. Upon presentment for acceptance or demand of payment, and

2d. Upon receiving due notice of a failure to accept, or to pay the bill at maturity.

The drawee by accepting the bill, assumes the same liability as that of a maker of a promissory note—being the principal debtor. *Wallace v. McConnell*, 13 Pet., 136.

If, however, the bill is payable at a particular time after date, presentment for acceptance is unnecessary. *Commercial Bank v. Perry*, 10 Rob. (La.), 61.

It is always sufficient to present a bill for payment at maturity.

Varieties of Acceptances—Defined.—There are but two general kinds of acceptances: (1) Absolute or general, and (2) Conditional or qualified. The various authors upon negotiable instruments have given other kinds of acceptances depending largely upon the method of acceptance. They mention express, implied, verbal, partial, local, virtual, and written.

(a.) **Absolute Acceptance—Defined.**—An absolute acceptance is one by which the drawee promises to pay the bill according to its tenor.

(b.) **Conditional Acceptance—Defined.**—A conditional acceptance is one where the drawee promises to pay the bill according to some condition imposed.

Effect of a Conditional Acceptance.—If the holder accepts a conditional acceptance, he thereby releases all prior parties from liability unless they assent to such conditional acceptance in some way.

An *express acceptance* may be either absolute or unconditional. It is usually indicated by writing the words "Accepted," or "Seen," "Honored," or "I will pay the bill," or "A direction to some third person to pay the bill," or any statement either verbally or in writing by which the drawee indicates his intention to accept and pay the bill. *Phillips v. Frost*, 19 Me., 77; *Spear v. Pratt*, 2 Hill, 582; *Cook v. Baldwin*, 120 Mass., 317.

But in Iowa it was held that the statement "Kiss my foot," signed by the drawee, was a rejection of the bill. *Norton v. Knapp*, 64 Ia., 112.

It has been repeatedly held that any word or statement by the drawee which does not in itself negative the request to accept, may be treated as a valid acceptance. *Dufaur v. Oxenden*, 1 Moody & R., 90.

Implied Acceptance—Defined.—An *implied acceptance* is any act on the part of the drawee which clearly indicates an intention on his part to comply with the request of the drawer. This

but it was conceded on the argument that such was the fact, and that such is the meaning of the case stated.

The judgment is affirmed.

act may be either in words or conduct in the absence of statutory regulations. *Anderson v. First National Bank*, 2 Fed. Rep., 125; *McCutchen v. Rice*, 56 Miss., 455.

The implied acceptance may arise from a detention or a destruction of the bill or from some other unwarranted use of it. If the drawee, however, destroys a bill after he has notified the drawer or holder that he would not accept it, such destruction will not amount to an acceptance. *Hall v. Steel*, 68 Ill., 231; *Dunavan v. Flynn*, 118 Mass., 537.

It has been held that a part payment of the bill would not amount to an acceptance in writing. *Cook v. Baldwin*, 120 Mass., 317; *Bank of Rutland v. Woodruff*, 34 Vt., 89.

A detention of the bill may or may not amount to an implied acceptance, depending upon: 1st—What is said at the time the bill is left with the drawee, and 2nd, the custom between the parties. *Chitty on Bills*, 334.

Local Acceptance—Defined.—A *local acceptance*, may be either absolute or conditional, but is made payable at some particular place. *Troy City Bank v. Lauman*, 19 N. Y., 477.

Partial Acceptance—Defined.—A *partial acceptance* is one where the drawee undertakes to pay but a part of the amount of the bill. *Petit v. Benson, Comberbach* (1697), 452.

Virtual Acceptance—Defined.—A *virtual acceptance* is a mere promise to accept.

Acceptance—When Excused.—The presentment for acceptance of a bill of exchange will be excused under the following circumstances:—

- a. Where the drawee is dead; or
- b. Where the drawee is a fictitious person; or
- c. Where the drawee has absconded; or
- d. Where after due diligence the drawee cannot be found.

An irregular presentment will be held good where the drawee refuses to accept upon other ground.

SECTION 26.

AN ACCEPTANCE SHOULD BE ABSOLUTE AND IDENTICAL WITH THE TENOR OF THE BILL. A PARTIAL, CONDITIONAL OR QUALIFIED ACCEPTANCE WILL RENDER THE PARTIES TO SUCH AN ACCEPTANCE LIABLE ACCORDING TO THE TERMS OF THEIR ACCEPTANCE.

PETIT v. BENSON.¹

TRINITY TERM, 1697.

[*Reported in Comberbach, 452.*]

A bill was drawn upon the defendant, who accepted it by indorsement, in this manner: "I do accept this bill to be paid, half in money and half in bills." And the question was, whether there could be a qualification of an acceptance; for it was alleged that this writing upon the bill was sufficient to

¹ This case is cited in Daniel on Negotiable Instruments, Sec. 508, 516; Story on Bills of Exchange, 239; Ames on Bills and Notes, 146. Benjamin's Chalmers on Bills, Notes and Checks, 51; Norton on B. and N., 84.

In the case of *Wegerfloffe v. Keene*, (1 Strange, 214), Strange attorney for defendant said: "This was an action upon the case upon the custom of merchants brought by the person to whom a foreign bill of exchange is made payable, against the acceptor. The declaration set forth, that one James Collet, being a merchant residing in Christiana in Norway, according to the custom of merchants drew his first bill of exchange upon the defendant, requesting him to pay the plaintiff such first bill (his second not being paid) of 127*l.* 18*s.* 4*d.* which bill was afterwards, viz., December 9th, 1717, shown to the defendant, who accepted to pay 100*l.* upon the 8th day of February following, by virtue whereof he became chargeable, *et in consideratione inde eisdem die et anno ultimo supradictis super se assumpsit*, to pay the same on the said 8th day of February *tunc prox' sequentem*, which he has not done according to his undertaking. There is likewise a count for monies had and received, and an *insimul computassent*. The defendant as to those two counts pleads *non assumpsit*, and as to the count upon the bill, he pleads, that the said James Collet drew another bill for 100*l.* only, wherein he countermands the payment of the odd 27*l.* 18*s.* 4*d.* by virtue whereof the defendant paid the 100*l.* in satisfaction of the first bill, and the plaintiff accordingly received it in satisfaction. The plaintiff *protestando* that the defendant did not pay it in satisfaction; for plea saith, that he never received it in satisfaction. And to this replication the defendant demurs.

Strange *pro defendente*. I shall not trouble the court with an

charge him with the whole sum. But it was proved by divers

exception which has formerly been taken to these replications, that the payment in satisfaction has been admitted, the traverse of the acceptance is immaterial; for I am sensible, it has been adjudged to be well enough in the case of *Young v. Ruddle*, Salk., 627, and of *Hawshaw v. Rawlings*, in this court, upon the ground, that there can be no payment in satisfaction, without an acceptance in satisfaction; and therefore a traverse of the acceptance is an argumentative denial of the payment; for if the plaintiff did not accept it in satisfaction, the consequence of that is, that it was not paid in satisfaction.

Laying therefore the plea and replication aside, I shall take up the case as it stands upon the declaration, and upon that, offer some things distinctly, both as to the matter, and as to the manner of it.

As to the matter of it, the case is no more than this; the person to whom a foreign bill of exchange is made payable, brings his action against the drawee, upon a partial acceptance for so much of it as he undertook to pay, and counts upon the custom of merchants.

The single point which will arise upon this case is, whether a partial acceptance be good or not within the custom of merchants. And I shall endeavor to prove, that this acceptance is a void acceptance, and consequently the plaintiff has no cause of action.

That I may not be misunderstood when I call this a void acceptance, I would premise, that I do not mean, it is so absolutely void as to exclude any remedy against the acceptor, for I must admit, that this acceptance will create a contract between the parties, upon which an action upon the case would have laid. But what I shall insist upon is, that this is a void acceptance within the custom of merchants, upon which the plaintiff has founded his case; and if it be void within the custom of merchants, then, whatever effect it would have as a private contract between the parties, will be a matter foreign to the present question, in as much as the plaintiff has not relied on it as such, but has brought his action upon the custom.

I have inquired into the practice of merchants in this case, but have not been able to get any certain account of this matter. The true reason of which I apprehend to be, that it is a case which seldom or never happens amongst merchants, for they honor one another's bills, though there are no effects of the drawer in their hands; and they would esteem it the greatest blemish that could be cast upon them, if their correspondent should once refuse to answer their bills any further than they had effects in his hands.

What account I have received, I shall submit to the court. Some are of opinion, that an acceptance for part is an acceptance for the whole, in as much as it deprives the party of the benefit of

merchants that the custom among them was quite otherwise,

protesting, and so resorting back to the drawer. But I apprehend there is no reason at all for this. To say that because commonly a man does honor another's bill beyond what effects he has in his hands, that therefore he must do it, is a strange conclusion. For suppose he has but 20% of the drawer in his hands, and is bound to answer a bill for so much; it would be highly unreasonable, that in case the other should draw for 10,000% this man must either pay the whole, or subject himself to an action for non-performance of the condition.

But if this notion should prevail, that an acceptance for part is an acceptance for the whole; yet as on the one hand it charges the acceptor with the entire sum, so on the other hand it discharges him of this action. For then there can be no color to split the demand into two actions, but the plaintiff, in declaring for part ought to show, that the rest is satisfied. Salk., 65.

Others are of opinion, that the party ought not to have taken this acceptance, but protested the bill as to the whole, and sent for another to the value of what the drawee would answer. This likewise makes for the acceptor the defendant.

I am informed indeed, there is one gentleman who does attend to say, that this matter has happened in his own experience; but he, by what I find, is alone in that opinion, and perhaps may not have considered the consequences of it.

As there is this diversity of opinions upon a matter which seldom or never comes in practice, I shall take it upon the reason of the thing, with a view likewise to the many inconveniences which will follow as a consequence of establishing this partial acceptance.

The better to come at this, it may not be improper to state the method of transacting these affairs. When the party to whom a bill of exchange is made payable receives it, he immediately applies to the drawee to get his acceptance: if he accepts it, nothing further is done till the day of payment, and then if it be paid the matter is at an end. But if the drawee will not accept it, then the party is to protest the bill, and send back the protest by the next post. When the time of payment comes, he tenders the bill again, and then the drawee may either pay it or refuse it: if he refuses it, then there is a second protest for non-payment, and the bill itself is returned. And so it is if he accepts it, and afterwards refuses to pay it. From all this I would infer, that there can be no partial protest for non-acceptance, which as I am informed is a protest not in the memory of any but one of the notaries public. The words of all protests are; *I exhibited the original bill to the person to whom directed, and demanded his acceptance thereof.* Now an acceptance of part is not an acceptance thereof, no more than payment of part is a payment of the whole. There is a book which goes by the name of "*Advice Concerning Bills of Exchange,*" and is esteemed amongst those who are most conversant in these affairs.

and that there might be a qualification of an acceptance: for

And in fol 33, of that book it is said, that nothing but an acceptance to pay *secundum tenorem billæ* can deprive the party of the benefit of a protest. And in fol. 16 of the same book he puts the case of a bill drawn on A. and B., who are not joint-traders, and an acceptance by one only: this says he goes for nothing, and the party must protest the bill as in case of no acceptance. These are the words of the book: and by putting the case of two who are not joint-traders, I should apprehend he means, that each being charged with a moiety, the acceptance of one is but an acceptance to pay a moiety, which is but a partial acceptance, and therefore void: and this is explained by the case of *Pinkney v. Hall*, (Salk., 126), where one joint trader accepted a bill, and it was held to be the acceptance of both, because both were equally liable to pay the whole. And to this purpose likewise, is *Molloy de Jure Maritimo* in the chapter concerning bills of exchange.

If there can be no protest for non-acceptance of part, I would consider how the case would stand in regard to allowing this partial acceptance: the natural and plain consequence of that will be, to put it in the power of the drawee, to defeat the other of the benefit of protesting a bill for 10,000*l.* by his acceptance to pay one penny only; for this I would submit, that if the party *may* take such an acceptance, he *must* take it: if it will be good, he cannot refuse it, for it is not at his election to charge the drawer but upon the other's default; the drawee is the person to whom he must first resort, and if he refuses, then and not till then, is there a proper remedy against the drawer; and therefore in the action against the drawer the plaintiff must show a protest, which is an endeavor to receive the money of the drawer. Salk., 131.

But even admitting there may be a partial protest for non-acceptance, yet the inconveniences which will follow of course are so great, that I hope it shall never be established by the judgment of the court.

It would be endless to put cases where it has been held, that rent-charges and the like cannot be apportioned; and therefore I shall rely entirely upon the reason of the thing, that in this case the contract between the drawer and the person to whom the bill is payable is entire and not divisible. By this contract the drawer (and consequently the indorser) subjects himself to an action if the money be not paid at the time: but though he becomes liable to one action, yet there is no reason, that by transactions between the party to whom the bill is payable, and the drawee, to which he is not privy, this contract should be branched out into several actions, which will unavoidably be the case of every partial acceptance: for I do not apprehend how this can be reduced to one action by refusing this partial acceptance: and protesting for the whole; because (as I observed before) if the party *may* take it, he *must* take it, and can charge the drawer no farther than there is a default in the drawee.

he that may refuse the bill totally, may accept it in part. But

As therefore two actions are the fewest he can be charged with, I would beg leave to instance how he may be charged with a great many. The acceptor will charge him as far as his undertaking: then another for the honor of the drawer (as is usual amongst merchants) may undertake for another part, and by the same reason a third, and a fourth, and no body can say where it shall stop: so many different persons may accept for so many different pence, and every one of these has his distinct remedy against the drawer.

This is too great an inconvenience to be got over; and it is such an inconvenience (I mean the multiplicity of suits) as the common law has always endeavored to meet with. In the case of *Hawkins v. Cardee*, Salk., 65, it was held, that the indorsee of part could have no action, because says Ld. C. J. Holt, the drawer having only subjected himself to one action, it cannot be divided so as to subject him to two. If the grantee of a rent charge levies a fine of part, the conusee cannot compel an attornment, for that would be to give two actions against the tenant. So if a feoffment were made to a man and his heirs with warranty, and he makes a feoffment to two, the warranty is gone. If two take lands jointly with warranty, and one makes a feoffment: the warranty is gone to him, but remains as to his companion, so as he may vouch for a moiety; and at common law if they had made partition, the warranty was lost. Co. Litt., 187a. And all this goes upon that ground, that it being *res inter alios acta*, it shall not turn to the prejudice of a third person. But this partial acceptance is a matter transacted between mere strangers; and therefore shall not hurt the drawer, who was no party to it. No act of theirs, which would be prejudicial to him, shall bind him. But the subjecting him to several actions will be a prejudice; therefore he shall not be subjected to several actions.

The great benefit arising to the public from these bills is, their being negotiable and passing about as money; for everybody is sensible, that without the assistance of these bills our trade could never be carried on for want of sufficient *specie*; not to mention the trouble and danger in returning money, which is avoided by this expedient. It is this benefit which the public receives from these bills, that has entitled them to all the favor they have received, of which innumerable instances might be given. For this reason it has been held, that the bare drawing or accepting a bill, makes a merchant for that purpose. 1 Salk., 125; Show., 125; 2 Vent., 295. Now if what is contended for on the other side should prevail, the public will be deprived of this great benefit; for no man will take this bill as so much money in the way of trade, when he is to resort to one man for one part, and perhaps send out of the kingdom for the other to a place where he has no correspondent. In the case of *Jocelyn v. Laserre*, which was in this court,

he to whom the bill is due may refuse such acceptance, and

(Hil., 11 Ann. rot., 214), where the bill was to pay *out of my growing subsistence*, it was held, that in this regard, his growing subsistence might never amount to the sum drawn for, therefore this was not a bill of exchange within the custom of merchants, for nobody would take it upon such a contingency. And the cases of promissory notes since the statute have gone upon the same reason. *Smith v. Boheme* (Mich., 1 Geo. in B. R.), which was to pay money or surrender a man to prison. And the case of *Appleby v. Biddle* (B. R. Hil., 3 Geo.), which was to pay so much to A. if I do not pay so much to B., and both these were held not to be within the statute, upon that only reason that they were not negotiable.

Another inconvenience which naturally occurs upon this occasion is, that the drawee will insist to have the whole bill delivered up, when he pays but a part only. For according to the authors who treat of this subject, he can never charge the drawer, when they come to make up their accounts, with more than he has vouchers for under the hand of the drawer. In *Lex Mercatoria*, 274, it is said, that if the bill be lost, the drawee cannot justify the payment, though he has a letter of advice. And this refutes all the expedients of indorsing part, or giving a special receipt for so much, because in neither of those cases will the drawee have any authority to produce under the hand of the drawer. If the drawer then refuses to allow what the other has paid, his only remedy will be to bring his action; and how he will be able to maintain it upon the custom of merchants, I must confess myself at a loss to find out, for he will want the necessary evidence to maintain such an action, which is the bill itself that was drawn upon him.

If this then will be the case, where he pays the money without taking up the bill; I must contend that by all the rules of prudence and justice he may insist to have the whole bill delivered up to him, when he only pays part of it according to his acceptance.

Supposing him then in possession of the whole bill, I would consider in what a condition we have left the party to whom it was made payable. He must be supposed to have advanced a consideration adequate to the whole sum, and consequently is in justice entitled to his whole money of somebody or other. It will be said, that he may get what he can of the drawee, and then go back to the drawer for residue. It is true he may do so, and the drawer may be a man of so much honor as to pay him every farthing. But what must he do when he finds he is mistaken in his man; when the drawer (instead of ordering him the money as he expected) shall tell him, "No, you have nothing to produce under my hand, and if you have been so foolish as to deliver up the bill, you must take it for your pains." I know of no remedy in this case but what would be worse than the disease, and there-

protest it so as to charge the first drawer; and though there be
fore the most prudent thing he can do will be to sit down by the loss.

And this will be so far from being a trick in the drawer, that it will be no more than what every prudent man will do. For if upon the report of what has been done he should advance the residue of the money, yet still there is a bill standing out against him for the whole, upon which bill it cannot appear he has paid the money which the drawee had left unpaid. And whether in that case he would not afterwards be answerable for the whole, may be proper to be considered.

I have now done with what I had to offer in maintenance of the negative of the question I proposed to speak to, and shall therefore proceed to take notice of what was hinted at upon the former argument in behalf of the plaintiff in this case.

It was said that the drawee may (and very often does) accept to pay the money at a different time from what is appointed in the bill. I must admit he may do so, but surely that case can bear no proportion to this case. It is not liable to any of the inconveniences I mentioned; it is the same as if the bill had at first given him a longer time, and it is well known that after acceptance a month or two will break no squares where the man is good; with this further, that amongst merchants such an acceptance is esteemed a general acceptance to pay the money according to the tenor of the bill. Besides, Molloy says, that in such a case the bill must be protested, which cannot be done in our case.

It was further urged to be highly reasonable, that the drawee should honor the bill as far as he had effects. I admit this to be reasonable, and perhaps it would not have been impossible for the plaintiff to have declared in such a manner, as to have charged the defendant to the amount of his acceptance; but we are here upon the custom of merchants, and whatever might be reasonable in case of private property, will cease to be so, when it appears to be pregnant of so many inconveniences to the public as I have mentioned. And if the plaintiff has it in his power to frame a case wherein he may do himself justice, that makes the argument stronger against suffering him to break in upon the public convenience for his private benefit. The policy of the law is, rather to let one man suffer, than to introduce a general inconvenience: but here we are to be led into the greatest inconveniences, even in a case where there is no danger of the party's suffering in the least; for he has a remedy, which stands clear of all these inconveniences, and there will be no harm in leaving him to that.

It was said, that if the drawer (who is supposed to know what effects he has in the other's hands) by drawing for more, subjects himself to several actions, it is his own fault. The answer to this is, that the very drawing for more, destroys the presumption that he knew how accounts stood. But amongst merchants, as I ob-

an acceptance, yet after that he hath the same liberty of charging the first drawer as he before had.

served before, that is not the case, for they often honor one another's bill, where there are no effects at all.

But even admitting that, the drawer does not stand altogether clear of this objection, yet still this may be the case of one who cannot be supposed to know how the accounts stood between the drawer and the drawee: for it may happen this bill may be indorsed, and then the indorser is to be charged in the same manner as the drawer. The indorser will be liable to several actions, though he is in no ways privy to any of the transactions between the indorsee and the drawee.

Upon breaking the case upon the former argument a difference was taken between the case of the acceptor and that of any other person: that *he* should not come and discharge himself against his own acceptance, whatever the other might have done as to refusing this partial acceptance. If this was his case only, it might be reasonable to extend this acceptance as far as it will go; but the hardship is, that what is law in his case, must likewise be law in the case of the drawer and indorser; so that here are two innocent persons who are to be involved in the same common fate; and that is never to be suffered, especially when the drawee may be charged in another name, which will not affect the drawer or indorser.

But if this partial acceptance should be thought good within the custom of merchants: yet the plaintiff can never recover in this action, in regard to the manner in which he has declared.

The Payee or Holder May Refuse a Partial or Conditional Acceptance.—The payee or holder is entitled to an absolute acceptance of the bill. If the drawee refuses to give such an acceptance, the holder may protest the bill for non-acceptance and look to the drawer for payment. *Wintermute v. Post*, 24 N. J. L., 420; *Gibson v. Smith*, 75 Ga., 33; *Stevens v. Water Co.*, 62 Me., 498; *Wallace v. Douglas*, 116 N. C., 659; 1 *Daniel on Neg. Inst.*, sec. 509; *Boehm v. Garcias*, 1 Camp., 425; *Shaver v. Western Union Tel. Co.*, 57 N. Y., 459; *Green v. Raymond*, 9 Neb., 298.

Antecedent Parties are Discharged by a Qualified or Conditional Acceptance.—When the payee or holder of a bill of exchange accepts a qualified or conditional acceptance, he thereby releases all prior parties unless he can secure their assent to such an acceptance. *Rowe v. Young*, 2 B. & B., 165; *Walker v. Atwood*, 11 Mod., 190; *Russell v. Phillips*, 14 Q. B., 900; *Edwards on Bills*, 429; *Story on Bills*, 272; *Daniel on Neg. Inst.*, 510, 511.

SECTION 27.

**AN ACCEPTANCE MUST BE BY THE DRAWEE. A STRANGER
DOES NOT BECOME AN ACCEPTOR BY THE
ACCEPTANCE OF A BILL OF EXCHANGE.**DAVIS v. CLARKE.¹

IN COURT OF QUEEN'S BENCH, 1843.

[*Reported in 6 Adolphus & Ellis, N. S., 16; 6 Queen's Bench, 16;
51 Eng., C. L., 15.*]

The Form of Action.—Assumpsit. The first count stated that "one John Hart," on the 8th day of March, 1838, "made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to him or his order 100*l.*," value received, at twelve months after date, which had elapsed before the commencement, etc.; "and the defendant then accepted the said bill, and the said John Hart then indorsed the same to plaintiff;" averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay.

There was also a count on an account stated.

The first plea denied the acceptance; the second the promise; the third alleged a discharge of the defendant by the Insolvent Debtor's Court.

The replication joined issue on the first two pleas, and traversed the discharge alleged in the third; on which traverse issue was joined.

On the trial, before Parke, B., at the Essex Summer assizes, 1843, a written paper, in the following terms, was given in evidence on behalf of the plaintiff.

¹ This case is cited in Story on Bills of Exchange, 35, 58, 121, 254; Daniel on Negotiable Instruments, 97, 98, 362, 485, 486; Wood's Byles on Bills and Notes, 158, 300; Tiedeman on Commercial Paper, 15, 219, 228; Bigelow on Bills and Notes, 37; Bigelow's Cases on Bills and Notes, 45; Paige's Illustrative Cases on Commercial Paper, 43; Benjamin's Chalmers, Bills, Notes and Checks, 48.

“ £100.

“ *London, 8th March, 1838.*

“ *Twelve months after date pay to me or my order one hundred pounds, value received.*

“ *To Mr. John Hart.*

John Hart.”

Across the face of this instrument was written the following:

“ Accepted.

“ H. J. Clarke.

“ payable at 319 Strand.”

This writing across the face was proved to be the defendant's handwriting.

No other evidence being produced, the learned baron directed a non-suit. In Michaelmas term, 1843, Petersdorff obtained a rule nisi for a new trial.

The Claim of Defendant.—The defendant has not accepted the bill described in the declaration: the instrument produced is indeed no bill of exchange. In *Gray v. Milner*,¹ where the instrument was not addressed to any one, but had only a place of payment added, and in other respects resembled the document here proved, the acceptor was held liable, as having admitted himself, by the acceptance, to be the party pointed out by the place of payment. Here the drawer addresses himself; and the instrument more nearly resembles a promissory note. It may be that the defendant might have been sued as a surety.

The Claim of Plaintiff.—This principle of *Gray v. Milner*,² applies. The defendant, by his acceptance, estops himself from disputing his own character and the nature of the instrument. In *Polhill v. Walter*,³ indeed, it was said that no one could be liable as acceptor, unless he were the person to whom the bill was addressed, or an acceptor for honor. But the question of acceptance in this form was not then distinctly before the court. Here it may be contended that the defendant identifies himself as the person addressed under the name of John Hart. The judge at nisi prius was requested, but refused, to allow an amendment, by calling the instrument a

¹ 8 Taunt., 739.

² 8 Taunt., 739.

³ 3 B. & Ad., 114.

promissory note made by the defendant; the writing the name was a new making, according to the principle of *Penny v. Innes*.¹

The Decision.—There is no authority, either in the English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. *Polhill v. Walter*,² and *Jackson v. Hudson*³ are authorities showing that the defendant here cannot be sued as acceptor. In *Jackson v. Hudson*, Lord Ellenborough treated an acceptance by a party not addressed as “contrary to the usage and custom of merchants.”

No previous case seems to be exactly like this. In *Jackson v. Hudson*,⁴ there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In *Gray v. Milner*, no⁵ party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the address. I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough. Then it is said that the defendant is estopped: but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

The only question is, whether the defendant is such an acceptor as is described in the declaration; that is of a bill of exchange directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to

¹ 1 C. M. & R., 439; S. C., 5 Tyrwh., 107; he referred also to *Jackson v. Hudson*, 2 Camp., 447.

² 3 B. & Ad., 114.

³ 2 Camp., 447.

⁴ 2 Camp., 447.

⁵ 8 Taunt., 739.

the defendant at all. This is therefore not an acceptance within the custom of merchants.

The safe course is to adhere to the mercantile rule that an acceptance can be made only by the party addressed, or for his honor. Here the last is not pretended; and the first can not be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance; if the same, then the instrument is a promissory note and not a bill of exchange.

RULE. Discharged.¹

¹ May v. Kelly, 27 Ala., 497; Keenan v. Nash., 8 Minn., 409; Smith v. Lockridge, 8 Bush., 425.

If the Name of the Drawee is Left Blank the Acceptance May be by a Stranger.—It has been held, in cases where the name of the drawee is left blank, that a stranger to the bill may fill the blank with his own name and accept the bill. Gray v. Milner, 8 Taunton, 739; Wheeler v. Webster, 1 E. D. Smith, 1; 1 Parson's B. & N., 289.

An Acceptance by a Member of a Partnership Binds the Firm.—An acceptance by a member of a partnership of a bill drawn upon the firm will bind all. Mason v. Rumsey, 1 Camp., 384; Tolman v. Hannahan, 44 Wis., 133. But see contra Herman v. Nash, 8 Minn., 407. See also Rumsey v. Briggs, 139 N. Y., 323.

Where a Bill is Drawn Upon Two or More Jointly All Should Accept.—Where a bill is drawn upon two or more, jointly, they must all join in the acceptance. If any of the joint parties refuse to accept the bill should be protested for non-acceptance. If any of the joint parties do accept they will be bound. Smith v. Milton, 133 Mass., 369; Chitty on Bills, 73, 321.

Acceptance May be by an Agent.—Of course an acceptance may be by an agent if he has proper authority to act for his principal. Daniel Neg. Inst., 487; Byles on Bills and Notes, 113; Richards v. Barton, 1 Esp., 269; Sternan v. Harrison, 42 Pa. St., 49; Moeise v. Knapp, 30 Ga., 942; Goodrich v. DeForest, 15 Johnson, 6.

SECTION 28.

AN ACCEPTANCE IS INCOMPLETE UNTIL DELIVERY, EITHER ACTUAL OR CONSTRUCTIVE, AND MAY BE REVOKED.*

COX ET AL. v. TROY.¹

IN THE KING'S BENCH, HILARY TERM, 1822.

[*Reported in 5 Barnwell & Alderson, 474; 7 Eng. C. L., 260.*]

The Form of Action.—Assumpsit upon a bill of exchange, for 938*l.*, dated the 20th day of May, 1820, drawn by Stephen and James Roch, upon the defendant and W. T. Robarts, since deceased, by the names and firm of Messrs. W. T. Robarts & Co., London, payable 61 days after sight to Michael Murphy, and indorsed by him to the plaintiffs, and alleged to have been accepted by the defendant and W. Tierney Robarts, payable at Messrs. Robarts, Curtis & Co. The first count stated these facts, and a presentment for payment when due, and refusal to pay at Messrs. Robarts, Curtis & Co. The second count was on a general acceptance; and the third was special, stating that the bill was delivered to the defendant and W. T. Robarts, to determine within a reasonable time, whether or not they would accept the same: and that they promised to take due care of the same, and return the same without defacing or spoiling it, which they did not do, but returned the same bill in a defaced and injured state. The declaration also contained the usual money counts. Plea, general issue. The cause was tried at the sittings after Trinity term, 1821, before Abbott, C. J., when a verdict was found for the plaintiffs, subject to the following case:—

* *Dunavan v. Flynn*, 118 Mass., 537; *Trent Tile Co. v. Fort Dearborn*, 54 N. J. L., 33; *Fort Dearborn v. Carter*, 152 Mass., 34; *Jeune v. Ward*, 2 Stark, 326; *Lindsay v. Price*, 33 Tex., 280.

¹ This case is cited in *Daniel on Negotiable Instruments*, 63, 490, 493; *Wood's Byles on Bills and Notes*, 253, 314; *Story on Bills of Exchange*, 252; *Benjamin's Chalmers on Bills, Notes and Checks*, 61; *Chitty on Bills*, 308, 243, 296; *Tiedeman on Commercial Paper*, 34, 221, 250; *Ames on Bills and Notes*, 209; *Norton on Bills and Notes*, 70, 90, 95; *Randolph on Commercial Paper*, 88, 334.

It was admitted on the trial, that the bill of exchange mentioned in the declaration was drawn by Messrs. T. & J. Roch on the defendant and W. T. Robarts, since deceased, as stated in the declaration, and that the same was duly indorsed to the plaintiffs by the payee. The plaintiffs in London received the bill from Cork, on the 24th of May, 1820; and on the same day their clerk, by their directions, left it for acceptance at the defendant's counting-house in Old Broad street, London, in the usual way. He did not call for it until Saturday, the 27th of May, upon which day one of the defendant's clerks delivered back the bill of exchange to him without any observations being made at the time. The words "24th May, 1820, at Messrs. Robarts, Curtis & Co." (signed) "W. T. Robarts & Co." were written upon the bill by the defendant, or some one authorized by him, whilst the same was in his custody: and the jury found by their verdict that the defendant and the said W. T. Robarts did accept the bill of exchange: but at the time the clerk re-delivered the bill of exchange to the clerk of the plaintiffs, the words "24th May, 1820, at Messrs. Robarts, Curtis & Co., W. T. Robarts & Co.," were inked and written over, so as with great difficulty to be deciphered. The defendant did not offer any evidence to account for the obliteration of the acceptance. The bill itself was not obliterated, or any part of it rendered illegible.

The Claim of Plaintiff.—In this case the acceptance, when once made, could not be revoked by the defendant. It is so laid down in Marius,¹ although that is only a loose dictum. But in Molloy² it is said, that when a party has once subscribed, he can not afterwards blot out his name. And the Hamburg ordinance lays it down in general terms, that an acceptance once made can not be revoked. Trimmer v. Oddy, cited in Bentinck v. Dorrien,³ is an authority in point. There Ld. Kenyon was of opinion, that if a drawee deface the bill, *that* makes him liable as acceptor; and in Thornton v. Dick,⁴ this point was expressly ruled by Ld. Ellenborough.

¹ p. 83.

² Book 2, c. 10, s. 28.

³ 6 East, 200; Chitty on Bills, 160, S. C.

⁴ 4 Esp., 270.

It seems also to have been considered as the law in *Bentinck v. Dorrien*, and in *Fernandey v. Glynn*.¹ And it is treated as the law of France at the present day by Pardessus, a modern writer.² In *Adams v. Lindsell*,³ the defendant was held to be bound by the plaintiff's acceptance of the contract, although not communicated to him. Here the jury have found that there was once an acceptance by the defendants, and that being so, they had no right afterwards to revoke it.

Decision.—I am of opinion, that, in this case, the defendant is entitled to judgment. It is true, that the jury have found that he did accept the bill; but connecting that finding with the other facts of the case, it does not seem to me that it means more than that, at one period, the defendant, or some one in his behalf, did write an acceptance on it, and at that time was minded to accept it. The question will then be, whether having that intention at the time, and having written his acceptance, he was at liberty, on an alteration of circumstances, to erase those words before he delivered out the bill to the holder. Upon that question, there appears, in the books, to be some difference of opinion. In *Bentinck v. Dorrien*, Lawrence, J., says, “When the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance, while it is yet in the hands of the drawee, and where

¹ 1 Camp., 426, n.

² The passage referred to is in the *Cours de Droit Commercial*, by J. M. Pardessus, Paris, 1814, part 2, tit. 4, chap. 4, sect. 4, s. 1, p. 400. This writer, speaking of the effect of an acceptance, says: “Elle est irrévocable, et celui qui la donée ne serait pas libre de la rayer, même du consentement de celui sur la présentation duquel la lettre auroit été acceptée, parce que l’acceptation n’oblige pas simplement l’accepteur envers le porteur; qu’elle forme également un contrat entre le tireur et l’accepteur.” In the next paragraph, the same learned writer says: “Cependant comme le bonne foi doit être avant tout considérée, et que la seule crainte de la fraude ne doit pas empêcher des opérations légitimes, le tiré qui auroit trop précipitamment accepté, et voudroit révoquer son acceptation avant que la lettre qui en est revêtue circulé, pourroit la rayer et assurer la date et l’existence de ce changement par un protêt, ou par tout autre acte semblable, qui ne permettroit pas de croire que jamais la lettre ait circulé revêtue de l’acceptation non rayée.”

³ 2 B. & A., 681.

he obliterates it before any communication is made to the holder." That expression was used after the decision, in the cases of Thornton v. Dick and Trimmer v. Oddy. And at a later period, in Raper v. Birkbeck,¹ Ld. Ellenborough said, "I remember Pothier, in his treatise on bills of exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, '*il peut changer de volonte, et rayer son acceptation*'; a fortiori, then a third person who cancels an acceptance by mistake, shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill." The manner in which Ld. Ellenborough quotes the treatise of Pothier, seems to indicate that, at that time, he did not retain the opinion which he had delivered in the case of Thornton v. Dick. In a case like the present, which depends on the law-merchant, the opinions of learned lawyers and the practice of foreign and commercial nations, though they can not, strictly speaking, be quoted as authorities here, yet are entitled to very great weight and attention. When I find, therefore, that it is laid down in Pothier's treatise, that a party who has given an acceptance may erase it before the bill goes out of his hand, it affords a strong argument in support of the view which I take of the question. I think the rule there laid down is far better than the one contended for by the plaintiff. I cannot perceive how the holder of a bill, or any antecedent party, is prejudiced by it; for it is to him the same thing, whether when the drawees give it back, they deliver it to him unaccepted, or whether he finds that the drawees have withdrawn their acceptance, having at one time intended to accept it, but having subsequently changed their mind. Thinking, as I do, that no prejudice can arise to the holder, or any other parties to the bill, and that they are placed in precisely the same situation as if no acceptance was given, it seems to me, that it was competent for the acceptors to erase their acceptance before they delivered out the bill, and therefore that the defendant is entitled to our judgment.

¹ 15 East, 20.

By the bill the drawer requires the drawee to come under an engagement to pay it when due. The question is, when the drawee comes under an engagement, whether by the act of writing something on the bill, or by the act of communicating what has been written to the holder, and I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it. But while it remains in the drawee's hands, it seems to me, the acceptance is not fully binding on the person who signed it, and he is at liberty to say, before he parts with it, "I have not yet entered into an engagement to accept."

I think, that in this case the party was at liberty to cancel his acceptance prior to the time when it was delivered back. In the old books there are dicta which import that an acceptance once made cannot be revoked. In some of them it is said, anything which amounts to an assent to pay the bill, whether in writing or otherwise, is in point of law an acceptance; and I suppose it has been on that principle that the case of *Thornton v. Dick* was determined; but the two subsequent cases seem to show that *Ld. Ellenborough* had doubts as to his former opinion. In *Fernandey v. Glynn*, the cancelling of the check was with a view and under the idea that it would actually be paid, and in that case it was probably contended, either that the crossing or cancelling the bill amounted to actual payment, so that an action for money had and received would lie for the amount against the bankers, or that if not, yet it was to be considered in the nature of an acceptance. Now that case seems to me to apply strongly to the present; for there according to the usage, if a check was intended to be paid, but if not, nothing was done, but it was returned to the parties from whom it was received. And when the check in that case was cancelled, it was done with the intention of payment, and not really by mistake. In consequence, however, of the large payments made in the course of the day on account of the drawer, the bankers changed their intention; yet there the check was delivered back, and the original drawer

only was considered bound to pay it. The opinion of Pothier, stated in *Raper v. Birkbeck*, is precise on this subject, and is far better authority than the passages cited from Marius. Where a man accepts a bill, and delivers it out accepted, he must remain irrevocably bound by it. In contracts made between parties at a distance, if a man writes his acceptance, and sends it out of his hands, he can not revoke it afterwards. I am satisfied, however, that *this* is not a binding acceptance on the party, having been cancelled anterior to the time when the bill was delivered back.

This is a question of the law-merchant, and it is desirable that that law should be the same in *this* as in *every other commercial country*. We ought to act according to the judgments of the courts in our own country, but in the absence of these authorities, we may with great advantage take into our consideration the opinions of learned writers on this point. There seems to be no authority in the English law, except the case of *Thornton v. Dick*. I agree with *Ld. C. J.*, that *Ld. Ellenborough* seems to have changed the opinion which he is reported to have delivered in that case. The passage in *Molloy* is probably applicable to the case where the bill has been delivered out, for it does not speak of cancellation, but revocation. But the authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the courts, and he is spoken of with great praise by *Sir William Jones*, in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of *Littleton* on the laws of this country. We can not, therefore, have a better guide than Pothier on this subject. As to the opinion of *Pardessus*, I should understand him as rather speaking of bills delivered out, accepted and not erased. That seems to me perfectly clear from the next passage, where he says that, though a man does accept a bill, still if he cancels that acceptance before he delivers it out, that is sufficient. But considering this as a question merely of common sense, and judging from analogy, is it not clear

that the party is not bound in such a case as this? It may be said, that the defendants here ought to have shown that this was done by mistake. How is it possible to do that? The thing looks like a mistake. He may have written an acceptance, and afterwards find when he has written it, that it is on the wrong paper; and not meaning to accept that bill, he does that which shows that it was his intention not to enter into such a contract. Nobody can be injured by it. When the bill goes back it is in as good a state as it came. The party is still placed in the same situation. It appears to me, therefore, not only on authority, but on the principles of common sense, that the defendant was not bound by this as an acceptance, and that our judgment ought to be in his favor.

Judgment for the defendant.¹

¹ See *Wilde v. Sheridan*, 21 L. J. Rep., 260, which Ames in his valuable work on Bills and Notes cites for a contrary doctrine; 1 Ames on Bills & Notes, 214-218.

The Early Rule.—It was earlier held that an acceptance without a delivery was irrevocable. Ld. Ellenborough, in the case of *Thornton v. Dick* (4 Esp., 270), (1803) said, “But the acceptance having been proved to have taken place, he had no hesitation in saying that the act of acceptance was irrevocable; and that, if a party once accepted a bill of exchange, he had done the act, and could not retract. The moment the bill was accepted, he was bound, and the bill began to run; and the holder had a right to hold him to that liability which he had undertaken, and from which he, by his own act, could not discharge himself.”

In the case of *Bentinck v. Dorrien* (6 East, 199) (1805), where after acceptance and before delivery the acceptance was cancelled, Ld. Ellenborough said, “I was struck at first with consideration how far this might affect the right of third persons; but on further consideration, if this be an acceptance in law, notwithstanding the obliteration before delivery to the holder, it will still remain so as to such third persons.”

After Acceptance and Delivery it is Irrevocable.—When a bill of exchange is once accepted and delivered to the holder it then becomes a binding obligation according to its terms and is irrevocable. It has been said that it cannot be revoked even with the consent of the holder, for the reason that the drawer and all prior parties have a vested interest in the contract. Chitty on Bills, 308; *Thornton v. Dick*, 4 Esp., 270; Tiedeman on Commercial Paper, 221.

SECTION 29.

AN ACCEPTANCE MAY BE EITHER BY PAROL (UNLESS OTHERWISE PROVIDED BY STATUTE) OR IN WRITING; BEFORE OR AFTER THE BILL IS DRAWN AND BEFORE OR AFTER MATURITY.

JOHNSON ET AL. v. COLLINS.¹

IN KING'S BENCH, NOV. 25TH, 1800.

[Reported in 1 East, 98.]

The Form of Action.—The plaintiffs declared in the first count against the defendant as the acceptor of a bill of exchange drawn by one Ruff, dated the 25th of October, 1799; and directed to the defendant, whereby he was required two months after date to pay to the order of the drawer 23*l.* 10*s.* 6*d.*, value received, which bill was afterwards indorsed by Ruff to one Jane Ruff, and by her to the plaintiffs. There were other general counts for money had and received, money paid, and upon an account stated. To which there was a plea of the general issue.

At the trial before Le Blanc, J., at the last Worcester assizes, it appeared in evidence that Ruff, having furnished goods to the defendant to the amount of the bill, applied to him for payment, when the defendant excused himself at that time, but said that if Ruff would draw on him a bill at two months from the 25th of October for the amount he should then have money and would pay it. Ruff afterwards drew the bill in question, dated 25th of October at two months, but it never was in fact presented to the defendant for his acceptance; nor did he ever in fact accept it, otherwise than as is

¹ This case is cited in Wood's Byles on Bills and Notes, 302, 303; Norton on Bills and Notes, 93, 95, 98, 101; Ames on Bills and Notes, 171; Tiedeman on Commercial Paper, 5b, 220, 226; Benjamin's Chalmers on Bills, Notes and Checks, 44; Daniel on Negotiable Instruments, 555, 558, 559.

NOTE.—This case (Sec. 29) of Johnson v. Collings (1 East, 98) (Eng.), must be studied in connection with the case (Sec. 29a), of Coolidge v. Payson (2 Whea., 66); which latter case contains or lays down the present rule, where it has not been modified by statute.

stated above in his promise to accept. It was said at the trial to be the practice at Bristol, where the defendant lived, not to accept bills or to have them presented for acceptance. Ruff, to whose own order it was made payable, having indorsed the bill, afterwards passed it to the plaintiffs in discharge of an old debt; but no communication took place at the time between the plaintiffs and the defendant. After this and before the bill became due Ruff became a bankrupt; and when the bill was due the plaintiffs presented it to the defendant for payment, who then declined it on account of Ruff's bankruptcy without an indemnity, admitting however that he owed the money either to Ruff or to Ruff's assignees. The learned judge was of opinion that a mere promise, such as this, to accept a bill when it should be drawn, at least unless made to a third person, or accompanied at least with circumstances which might induce a third person to take the bill, (which was not the case here), did not amount to an acceptance, and therefore the plaintiffs were not entitled to recover on the first count. And that as there has been no communication between these parties at the time, nor any consideration having passed as between them, there was no evidence to warrant a finding for the plaintiffs on either of the money counts: whereupon he directed a non-suit to be entered, with liberty to the plaintiffs to move to set aside and enter a verdict for the amount of their demand, if the court should be of opinion that they were entitled to recover on either of the counts.

A rule nisi was accordingly obtained for this purpose on a former day.

In support of the rule it was argued:—1st. A promise to accept a bill when drawn amounts in law to an acceptance. In *Pillans and Rose v. Van Mierop and Hopkins* (1765)¹ the plaintiffs having advanced money to one White upon the faith of a written assurance by letter from the defendants "that they would accept such bills as the plaintiffs should in a month's time draw upon them for 800*l.* upon the credit of White," the court after much deliberation held that whether it were an actual acceptance or a loan to White upon the credit of the defendants, it would equally bind the latter.

¹ 3 Burr., 1663 (1765).

But Ld. Mansfield there said,¹ “This amounts to the same thing as an acceptance. *I will give the bill due honor* is in effect accepting it. If a man agree that he will do the formal part, the law looks upon it, in the case of an acceptance of a bill, as if actually done.” “An agreement to accept a bill to be drawn in future would, as it seems to me, by connection and relation bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn.”² “This agreement to honor the bill was a virtual acceptance of it.”³ Again, “A promise to accept is the same as an actual acceptance.” “The defendants have undertaken to honor the plaintiff’s draft, therefore they are bound to pay it.” The same doctrine was admitted in *Mason v. Hunt* (1779);⁴ but that was a conditional acceptance, and the condition was afterwards broken. In *Powell v. Monnier* (1737)⁵ there was an assurance by letter that the bill should be accepted, which was holden sufficient to bind the drawee: but that was after the bill was drawn.

2dly.—Supposing this not to amount in law to an acceptance, yet there is sufficient consideration to sustain a verdict for the plaintiffs on the money counts. The defendant owed Ruff this money; and his promise to honor the bill when drawn was an agreement to take as his creditor any person to whom Ruff should appoint the money to be paid. He then having by his indorsement appointed the money to be paid to the plaintiffs, it raises an *assumpsit* in law by the defendant to pay them so much. And the authority having been given by Ruff before his bankruptcy that event cannot vary the case. It was holden in *Fenner v. Mears*⁶ that general *indebitatus assumpsit* would lie by the assignee of a respondentia bond against the obligor, who had before engaged by an indorsement on the bond to pay the same to any assignee.

¹ *Ib.*, 1669.

² *Ib.*, 1673.

³ *Ib.*, 1674.

⁴ *Dougl.*, 297 (1779).

⁵ 1 *Atk.*, 611 (1737).

⁶ 2 *Blak. Rep.*, 1269. Vide also *Innes v. Dunlop*, 8 *Term Rep.*, 595, where the assignment of a Scotch bond was deemed a good consideration to support an *assumpsit* here.

though it was agreed that no action could have been maintained on the bond itself by the assignee in his own name. It was there also admitted that if the obligor had paid the assignee, the former might have pleaded payment to an action on the bond brought by the obligee. And it was there considered that the agreement amounted to a particular promise to the assignee whenever any such should be.

It was said, that the contract was devised to operate upon subsequent assignments, and amounted to a declaration that upon such assignment the money borrowed should no longer be the money of A. but of B. his substitute. So here the agreement to accept amounts to a particular promise to the holder of the bill to whom it is negotiated to pay him the amount: it is money had and received to his use. Thus in *Tatlock v. Harris*¹ a bill was accepted by the defendant payable to the order of a fictitious person whose supposed indorsement was put upon it; so that being incapable of proof, no action could be maintained as upon the bill. But the court held that a *bona fide* indorsee for a valuable consideration might recover against the acceptor upon an implied assumpsit for money paid and money had and received. *Ld. Kenyon* in giving judgment said, "it was an appropriation of so much money to be paid to the person who should become the holder of the bill." Again, in *Israel v. Douglas*² A. being indebted to B. for brokerage, and B. to C. for money lent, B. gave an order to A. to pay C. the money due from A. to B., which order A. having accepted, a majority of the court held that C. might maintain an action against A. for money had and received. And *Gould, J.*, expressly likened it to the case of a man having money due to another in his hands, which that other orders him to pay to a third person: and that there was no substantial difference, whether one in fact pays money to another for a third person, or whether he gives the other an order to pay over so much money, to which he assents: that in reason and sound law it was money had and received to the use of such third person. *Wilson, J.*, who differed on

¹ 3 Term Rep., 174.

² 1 H. Blac., 239.

that point, yet agreed that the action was maintainable on the count for the insimal computassent.

There is this further reason for holding the defendant liable, because his conduct was calculated to deceive third persons and put them off their guard: for if there had been no such promise to pay, the plaintiffs would have resorted to Ruff at once, and not have deferred their application till after the bankruptcy when it was too late. Besides, there was a subsequent promise by the defendant to pay the bill to the plaintiffs if they would indemnify him against Ruff's assignees; and as the law will indemnify him that is the same thing.

An Acceptance May be by Parole.—This is a question of great moment. It is much to be lamented that anything has been deemed to be an acceptance of a bill of exchange besides an express acceptance in writing; but I admit that the cases have gone beyond that line, and have determined that there may be a parole acceptance: that perhaps was going too far; but at any rate, the determinations have gone no further; and I am not disposed to carry them to the length now contended for, and to say that a promise to accept a bill before it is drawn is equally binding as if made afterwards.

It is not generally true, that a promise to do a thing is the same thing in law as the actually doing it; it certainly is not so as applied to this case. This was a promise to accept a non-existing bill, which varies this case from all those which have been decided upon the same subject; and I know not by what law I can say that such a promise is binding as an acceptance. The consequence is, that the plaintiffs cannot recover upon the count as upon an acceptance of a bill of exchange. As to the other ground, if we were to suffer the plaintiffs to recover on the general counts, we must say that a chose in action is assignable,¹ a doctrine to which I will never subscribe. I cannot, as at present advised, and upon the general view of it, agree with the case of *Fenner v. Mears* in *Blak. Rep.* The result of it, however, seems to be this, that the determination having been made according to equity and good conscience, the court would not disturb the verdict;

¹ Vide *Forth v. Stanton*, 1 *Saund. Rep.*, 210, 211, and n. 2 by *Serjt. Williams*.

and I doubt whether the decision can be sustained on any other ground. The undertaking there indeed was in writing; but I am not prepared to say that that makes any difference: though a distinction of that kind was much dwelt upon in another case as supplying a want of consideration:¹ but that has never been adopted since, and was afterwards expressly over-ruled in the case of *Rann v. Hughes* in the House of Lords.² However, no question of that sort can arise here; and I am clearly satisfied that there is no evidence to support the promises laid in any of the counts.

Grose, J., said, "It would be of most dangerous consequence to relax the rule of law to the extent here contended for. By the general rule a chose in action is not assignable, except by the custom of merchants. The assignment of a chose in action by a bill of exchange is founded on that law, and cannot be carried further than that will warrant it; and no authority has been cited to show that by the law merchant a mere promise to accept a bill to be drawn in future amounts to an actual acceptance of the bill when drawn. Then we have no authority to extend the rules which have been hitherto established. As to the general counts, if we were to permit the plaintiffs to recover on this evidence, it would be making all choses in action assignable, which cannot be contended for, and would throw the whole system into confusion."

Le Blanc, J., said: In the case of *Pierson v. Dunlop*,³ *Ld. Mansfield limited*, and truly limited, the doctrine which had been before laid down in *Pillans v. Van Mierop*. He there says "It has been truly said as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, *He will duly honor it*, is no acceptance; unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." Therefore, he ex-

¹ Vide the opinion of Wilmot, J., delivered in *Pillans v. Van Mierop*, 3 Burr., 1670, 1.

² 7 Term Rep., 350 n. [S. C., 4 Bro. Parl. Ca., 27, Toml. edit.]

³ Cowp., 573.

plains and limits his own rule which he had before delivered concerning such an acceptance, confining it to the case where credit is given by a third person upon the faith of such an assurance, on which he acts, and by which he is induced to take the bill.

Ld. Kenyon, C. J., added, that he thought that the admitting a promise to accept before the existence of the bill to operate as an actual acceptance of it afterwards, even with the qualification last mentioned, was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond the proper boundary: though this case was not helped even by that opinion.

Rule discharged ⁽¹⁾.

¹ Vide Clark v. Cook, 4 East, 57; Wynne et al. v. Raikes et al., 5 East, 514; McEvers v. Mason et al., 10 Johns. Rep., 207; Wilson v. Clements, 3 Mass. Rep., 9, etc. seq.: McKim v. Smith & Steene, 1 Hall's Amer. Law Journ., 486; Havens v. Griffin, Chip., 42.

In Beawes' Lex Merc., 454, pl. 16, it is said, "If the possessor (*i. e.* of a bill of exchange) hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draft, though previous to the knowledge of the drawer's misfortunes *he had acquainted him with his intention to honor his bill*, and even afterwards confesses that he should have done it, had it been presented and the acceptance demanded before the advice of the drawer's failure had reached him." And again, p. 466, pl. 112, "He that verbally or by letter has promised to accept any bills drawn on him for a third person's account, and he to whom the promise was made *does in consequence thereof give the third person credit*, relying on a punctual compliance; in this case, he that has engaged his word is obliged to fulfill it, or be answerable for all damages that shall proceed from a breach thereof, etc."

SECTION 29a—CONTINUED.

COOLIDGE ET AL. v. PAYSON ET AL.¹

IN THE SUPREME COURT U. S., FEB., 1817.

[*Reported in 2 Wheaton's Rep.*, 66; *Condensed Reports U. S.*, vol. 4, p. 33.]

Decision.—(Mr. C. J. Marshall delivered the opinion of the court.)

This suit was instituted by Payson & Co., as indorsers of a bill of exchange drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors.

At the trial the holders of the bill on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful owners. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the *Hiram*, claimed by Cornthwaite & Cary, which had been captured and libelled as

¹This case is cited in Benjamin's Chalmers Bills, Notes and Checks; Norton on Bills and Notes, 97; Wood's Byles on Bills and Notes, 304, 308; Paige's Illustrative Cases on Commercial Paper, 60; Chitty on Bills, 284, 286; Daniel on Negotiable Instruments, 551, 560, 1799; Story on Bills of Exchange, 249, 462; Tiedeman on Commercial Paper, 220, 226, 500. See also the following well discussed cases, *Bank of Michigan v. Ely*, 17 Wend. (N. Y.), 508 (1837); *Exchange Bank v. Hubbard*, 62 Fed. Rep., 112; *Bank v. Recknagel*, 109 N. Y., 482; *Lindley v. First Nat. Bk.*, 76 Ia., 629; *Exchange Bank v. Rice*, 98 Mass., 288; *Franklin Bk. v. Lynch*, 52 Md., 270.

lawful prize. The cargo had been acquitted in the District and Circuit Courts, but, from the sentence of acquittal, the captors had appealed to this court. Pending the appeal Cornthwaite & Cary transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore with scrolls in the place of seals, and drew on them for two thousand seven hundred dollars. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance. After its protest Coolidge & Co. wrote to Cornthwaite & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for two thousand dollars will be honored."

On the same day Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "You know the object of the bond, and, of course, see the propriety of our having one, not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible; what think you of the others?"

In his answer to this letter, Williams says, "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwaite & Cary, and paid to Payson & Co. in part of the protested bill of two thousand seven hundred dollars, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict.

The court, instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in the present action: *and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill*, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co. in their letter to him.

To this charge the defendants excepted. A verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Carey contains no reference to their letter to Williams which might

suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: *Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt?*

In the case of *Pillans & Rose v. Van Mierop & Hopkins* (1765),¹ the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under consideration of the court, no essential distinction is perceived. But, it is contended, that the authority of the case of *Pillans & Rose v. Van Mierop & Hopkins* is impaired by subsequent decisions.

In the case of *Pierson v. Dunlop et al.*,² the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Ld. Mansfield, in delivering his opinion, contradict those laid down in *Pillans & Rose v. Van Mierop & Hopkins*. His lordship observes, "it has been

¹ 3 Burr., 1663 (1765).

² Cowp., 571.

truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of *Pillans & Rose v. Van Mierop & Hopkins* had been understood to lay down the broad principle that a naked promise to accept, amounts to an acceptance, the case of *Pierson v. Dunlop*, certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn, was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued, that those circumstances to which Ld. Mansfield alludes, must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Ld. Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "*accompanied with circumstances*;" but it is not said that the answer must *contain* those circumstances. In the case of *Pierson v. Dunlop*, the answer did not contain such circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is, that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason v. Hunt* (1779)¹, Ld. Mansfield said, "there is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange?" It is the promise to accept—the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from *Cowper*² and *Douglass* are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, unquestionably, affect the whole transaction; but the mere circumstance, that the bill was taken for a pre-existing debt had not been thought sufficient to do away with the effect of a promise to accept.

In the case of *Johnson and another v. Collings* (1800),³ Ld. Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed, that the judgment given in that case would, even in England, change the law as previously established.

In the case of *Johnson v. Collings*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently, the bill does not appear to have been taken on the credit of that promise. It

¹ 1 Doug., 296 (1779).

² Cowper, 571.

³ 1 East, 98 (1800). See Sec. 29 of this text.

was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended, that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Ld. Mansfield, in the case of *Pierson v. Dunlop*.

Ld. Kenyon said, in that case, that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it. In *Clarke and others v. Cock*,¹ the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case (*Clarke v. Cock*), they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in the case of *Clarke v. Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and in *Pillans & Rosc v. Van Minerop & Hopkins*, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion, *that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards*

¹ 4 East, 57.

takes the bill on the credit of the letter, a verbal acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the circuit court, and it is affirmed with costs.

Judgment affirmed.¹

¹See the case of *Boyce v. Edwards*, 4 Peters, 121; *Parsons v. Armor & Oakey*, 3 Peters, 426; *Townsley v. Sumrall*, 2 Peters, 182. In order that a promise to accept a bill not yet drawn shall be binding upon the promissor the bill must be taken:

- 1st, by the holder upon the faith of the promise;
- 2d, the bill when drawn must follow the terms of the promise;
- 3rd, the promise should describe the bill to be drawn;
- 4th, the bill must be drawn within a reasonable time;
- 5th, the promise must be unconditional; and,
- 6th, the promise should be in writing. (In some jurisdictions it must be in writing.)

SECTION 30.

A BILL OF EXCHANGE WHEN DISHONORED MAY BE ACCEPTED FOR HONOR OR SUPRA PROTEST. SUCH ACCEPTOR IS NOT LIABLE THEREON UNTIL THE BILL HAS BEEN PRESENTED TO THE ORIGINAL DRAWEE FOR PAYMENT AT MATURITY AND AGAIN PROTESTED.

HOARE ET AL. v. CAZENOVE ET AL.²

IN THE COURT OF KING'S BENCH, NOV. 27TH, 1812.

[*Reported in 16 East's Rep., 391.*]

The Form of Action.—In an action by the indorsees of the bill of exchange hereinafter set forth against the acceptors, the declaration contained the usual averments, (the 1st count averring that the bill was presented for payment to the drawees and refused, the 2d count omitting that averment,) and charged that the bill having been refused acceptance by the drawees, and being thereupon duly protested for non-acceptance, the defendants, having notice thereof, accepted the bill for the honor of the first indorsers. The defendants pleaded the general issue; and at the trial before Ld. Ellenborough, Ch. J. (1811), a verdict was found for the plaintiffs for 816*l.*, subject to the opinion of the court on the following case.

The bill of exchange stated in the declaration was drawn by S. Hanbury at Hamburgh, on the 23d of July, 1810, upon Penn and Hanbury of London, in favor of Quevremont Balleydier & Co., for 800*l.* sterling, at 130 days after date. It was specially indorsed by Quevremont Balleydier & Co., to Perier Freres; by them to F. Farmbacher, all of whom reside abroad; by F. Farmbacher to Greffuhle, Freres & Co., who reside here; and by the latter to the plaintiffs, who are bankers in London. The first of the set of bills was trans-

²This case is cited in Chitty on Bills, 347, 344, 345, 349, 350; Daniel on Negotiable Instruments, 521, 1527; Wood's Byles on Bills and Notes, 402, 404; Benjamin's Chalmers on Bills, Notes and Checks, 53, 181, 229; Story on Bills of Exchange, 121, 123, 125, 254, 256, 261, 344, 363, 396, 423; Norton on Bills and Notes, 149, 152; Tiedeman on Commercial Paper, 228, 310, 313; Ames on Bills and Notes (Vol. 2), 790.

mitted, with the first special indorsement only, to the defendants, to procure acceptance: and they accordingly presented it for acceptance to Penn & Hanbury, who refused; whereupon the defendants caused a protest to be duly made for non-acceptance. The second of the set of bills was afterwards transmitted, indorsed so as to pass the property of Greffuhle, Freres & Co., with a reference upon the face of the bill to the defendants in the case of need. Greffuhle, Freres & Co., applied to the defendants for the first bill, and to know if it had been accepted: upon which the defendants delivered the first bill to them with the following acceptance by themselves: "accepted under protest for the honor of the first indorsers." The bill became due on the 3d of December, 1810, *but was not presented to the drawees, Penn & Hanbury, for payment; nor was it proved to have been protested for non-payment.* The defendants refused to pay the bill, in consequence of orders from the first indorsers. If the plaintiffs were entitled to recover, the verdict was to stand; if not, a non-suit was to be entered. This case was argued in 1811, and the court reserved it for further consideration.

Decision.—Ld. Ellenborough, Ch. J., delivered the judgment.

This was an action founded upon a set of bills of exchange for 800*l.*, accepted by the defendants for the honor of the first indorsers. The set was drawn by Samuel Hanbury at Hamburgh, 23d July, 1810, upon Penn & Hanbury of London, and was payable to Quevremont Balleydier & Co., at 130 days after date. The first of the set was transmitted to the defendants, that they might procure acceptance, but Penn & Hanbury refused to accept, and the defendants caused it to be protested for non-acceptance. The second of the set was indorsed to Greffuhle, Freres & Co.; they applied it to the defendants for the first, and the defendants delivered to them the first, accepted by themselves, for the honor of the first indorsers, that is to say, Quevremont Balleydier & Co. The bill became due the 3d of December, 1810, but was not presented to Penn & Hanbury, the drawees, for payment at maturity, nor protested for non-payment. In the first count it was stated, contrary to the fact, that it was presented to

the drawees for payment, and refused: in the second count this averment was wholly omitted. The defendants, (in consequence of orders from the first indorsers,) refused to pay it.

The Nature of the Liability of an Acceptor for Honor.—The question, in this case, is, whether a presentment to the drawees, Penn & Hanbury, for payment at maturity, and a protest for non-payment by them, is, or is not essential as a previous requisite to the maintaining an action against these defendants, the acceptors for the honor of the first indorsers; and this depends upon the nature and obligation of an acceptance for the honor of the drawer or indorser. If an acceptance in these terms be an engagement by the person giving it, that he will pay the bill when it becomes due, and entitles the holder to look to him in the first instance, without a previous resort to any person, the plaintiffs are in that case entitled to recover upon their second count: but if such an acceptance be in its nature qualified, and amount to a collateral engagement only, *i. e.*, an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonoring this bill, and such dishonor by him should be notified, by protest, to the person who has accepted, for the honor of the indorser, then the necessary steps have not been taken upon this bill, and the plaintiffs cannot recover. And such, after much consideration, we are of opinion is the case.

It is remarkable that no directly adjudged case upon this question is to be found; although the custom of merchants relative to this subject, is stated in the case of *Brunetti v. Lewin*,¹ in K. B., affirmed in error in the Exchequer Chamber, in favor of the original plaintiff, *Brunetti*. *Lutwyth*, in his report, says that he could not discover that any exception was taken to the validity of the custom, which he states as shortly this, “that if any merchant (for the honor of him to whom a foreign bill of exchange was first payable, and who had first indorsed the bill to another) shall pay the said bill to the last indorsee of it, *the bill being before then protested for non-payment*, then the merchant to whom the bill was first pay-

¹ 1 *Lutw.*, 896 (1781).

able, and who first indorsed the bill, shall have an action against the merchant who first took upon himself the obligation to pay the bill for the honor of the drawer (the bill *having been first protested likewise for non-acceptance*, for value of the bill and all charges)."

Thus two protests, *i. e.*, for non-payment as well as non-acceptance were in this case held necessary by the custom of merchants. The immediate point argued in error appears to have been whether it was sufficiently shown, agreeably to the custom alleged, that payment was, in that case, in fact made to the last indorsee, so as to found the claim of the first indorser, to payment to be made by the acceptor for honor, with the terms of the custom; but it certainly was also open to the plaintiff in error, to have insisted upon the validity of any part of the custom alleged; of which custom the protest for non-payment previously to the payment to the indorsee, and the subsequent claim upon the acceptor for honor, was a material part. In that case the undertaking for the honor of the drawer was not in the form of an acceptance upon the bill, but of "a note in writing for the honor of the drawer to pay the bill upon return;" but this, "according to Pothier on Bills of Exchange,"¹ is a mode substituted by "recent usage in the place of a signature by the person giving the caution on the bill itself;" and though the mode be different, the effect is for all substantial purposes the same.

Malyne, p. 273, in his 5th observation, says (speaking of the acceptor for the honor of the bill, whom he had just mentioned in his foregoing observation), "if this man at the time doth pay the said bill, because the party upon whom it was directed doth not, yet he is to first make, before he doth pay the same, *a protest*, with a declaration that he hath paid the same for the honor of the bill of exchange, whereby to receive the money again of him that hath made the bill of exchange. But it may be said that according to this position in Malyne, though a protest may be necessary to be made against the drawee by the acceptor for honor, to entitle him to recover against the party for whose honor he has accepted, yet that such protest for non-payment is not equally necessary

¹ 4 Des Avals.

to be made against the drawee, to enable any other holder to recover against the acceptor for honor himself.

But the next observation, in same page of Malyne, lays down the obligation more generally, and as attaching upon every holder of a bill (whether accepted, or not accepted, in whose hands it remains unpaid, up to the time of the appointed payment), the duty of making a protest for the non-payment of it. His words are these: "If a bill of exchange be accepted, and nevertheless not paid, and that it be not accepted as aforesaid, and remaineth unpaid, then must you cause the notary to make a second protest (assuming that the bill had been already protested for non-acceptance) for the non payment of it."

Pothier said: "When after a protest made for want of acceptance on the part of him upon whom the bill is drawn, a third person has intervened, and has accepted the bill for the honor of the drawer, or some indorser, all agree that at the expiration of the time of grace, the protest ought to be made not only to him upon whom the bill is drawn, and who has refused to accept it, but to the third person, who has accepted it for honor." I am aware that Beawes in his *Lex Mercatoria*, p. 421 s. 43, says, "He that accepts a bill upon protest, puts himself absolutely in the stead of the first acceptant, and is obliged to make the payment without any exception, and the possessor (*i. e.* the holder) hath the same right and law against such an acceptor as he would have had against the first intended one, if he had accepted." The literal sense of these words certainly seems to place this writer at variance with the authorities above cited; and if that were necessarily the case. one would not be disposed very readily to surrender the custom of merchants, as alleged on record, and not questioned in error in the case of *Brunetti v. Lewin*,¹ and the positions which are to be found in Malyne and Pothier (the latter, a most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law merchant in particular).

The use and convenience, and, indeed, the necessity of a protest upon foreign bills of exchange, in order to prove, in

¹ 1 Lutw., 896.

many cases, the regularity of the proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have required it. And, indeed, the reason of the thing, as well as the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder; for effects often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again when the period of payment had arrived. And the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort. Upon the whole, therefore, we are of opinion that the *postea* must be delivered to the defendants.*

*** The Contract of an Acceptor Supra Protest.**—When a person accepts a bill for honor he thereby agrees that he will, on due presentment for payment at maturity, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee and provided further that it shall have been protested for non-payment and notice of dishonor duly given him. *Schofield v. Bayard et. al.*, 3 Wend., 488; *Baring v. Clark*, 19 Pick., 220.

Acceptance for Honor.—For Whom Made.—Unless the acceptance for honor expressly states for whom it is made it is to be presumed to have been made for the honor of the drawer.

Acceptor for Honor—To Whom Liable.—An acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted it. *Hoare v. Cazenove*, 16 East, 391.

SECTION 31.

THE DRAWEE, BY ACCEPTING A BILL, THEREBY ADMITS THE GENUINENESS OF THE DRAWER'S SIGNATURE AND IS THEREAFTER ESTOPPED FROM DENYING THE SAME.*

PRICE v. NEAL.¹

IN THE KING'S BENCH, NOV. 16TH, 1762.

[*Reported in 3 Burrows, 1354.*]

The Form of Action.—This was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neal was indebted to him in 80*l.* for money had and received to his the plaintiff's use; and damages were laid to 100*l.* The general issue was pleaded; and issue joined thereon.

The Facts.—It was proved at the trial, that a bill was drawn as follows: "Leicester, 22 November, 1760. Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London; indorsed 'R. Ruding, Antony Topham, Hammond and Laroche. Received the contents, James Watson and Son: witness Edward Neal.'"

* This question arose for the first time in 1733, in the case of *Jenys v. Fowler et al.* (2 Strange, 946). This was an action by an indorsee against the acceptor. The defendant (acceptor) offered to prove that the bill was forged, by calling persons who were acquainted with the handwriting of the drawer, and who would swear that they did not believe it to be his hand. But the Chief Justice held that such evidence was not admissible, from the danger to negotiable contracts, and because a man might with design write contrary to his usual method. He strongly intimated that even actual proof of forgery would not excuse the defendant against their own acceptance, which had given the bill credit to the indorsee (plaintiff).

¹ This case is also cited in Daniel on Negotiable Instruments, 533, 1225; Norton on Bills and Notes, 58, 143, 144, 313; Wood's Byles on Bills and Notes, 319, 493; Benjamin's Chalmers on Bills, Notes and Checks, 242; Story on Bills, 113, 262, 263, 411; Chitty on Bills of Exchange, 307, 261, 291, 361, 431, 504, 638; Tiedeman on Commercial Paper, 230.

That this bill was indorsed to the defendant for a valuable consideration; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of 40*l.* and take up the said bill: which was done accordingly.

- That another bill was drawn as follows: "Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right & Co." That the plaintiff accepted this bill, by writing on it, "accepted, John Price;" and that the plaintiff wrote on the back of it, "Messieurs Freame & Barclay, pray pay forty pounds for John Price."

That this bill so accepted was indorsed to the defendant for a valuable consideration, and left at his bankers for payment: and was paid by order of the plaintiff, and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neal acted innocently and *bona fide*, without the least privity or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff. and assessed damages 80*l.* and costs 40*s.* subject to the opinion of the court upon this question:—

"Whether the plaintiff, under the circumstances of this case, can recover back, from the defendant, the money he paid on the said bills, or either of them."

Claim of the Plaintiff.—The plaintiff argued that he ought to recover back the money, in this action; as it was paid by him by mistake only, upon the supposition "That these were true genuine bills;" and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at Guildhall, of *Jenys v. Faw-*

ler et al.¹ (an action by an indorsee of a bill of exchange brought against the acceptor), Ld. Raymond would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer, to swear "That they believed it not to be so;" and he even strongly inclined, "That actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee."

But he urged, that in the case now before the court, the forgery of the bill does not rest in belief and opinion only; but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated, "That *that* bill was *accepted before it was negotiated*;" on the contrary, the consideration for it was paid by the defendant, *before the plaintiff had seen it*. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff; and therefore the reason, upon which Ld. Raymond grounds his inclination to be of opinion "That actual proof of forgery would be no excuse," will not hold here.

Claim of Defendant.—The defendant argued that the plaintiff was not entitled to recover back this money from the defendant.

He denied it to be a payment by mistake; and insisted that it was rather owing to the negligence of the plaintiff; who should have inquired and satisfied himself "Whether the bill was really drawn upon him by Sutton, or not." Here is no fraud in the defendant; who is stated "to have acted innocently and *bona fide*, without the least privity or suspicion of the forgery; and to have paid the whole value for the bills."

(Ld. Mansfield stopped him from going on; saying that this was one of those cases that could never be made plainer by argument.)

Decision.—It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff can not recover the money, unless it be against conscience

¹ 2 Strange, 946. See other cases upon same point: White v. Continental Bk., 64 N. Y., 316; Ellis v. Ohio Ins. Co., 4 Ohio., 628; Bank of U. S. v. Bank of Georgia, 10 Wheat., 333; Peo- R. R. Co. v. Neill, 66 Ill., 269.

in the defendant, to retain it: and great liberality is always allowed, in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he has *bona fide* paid, without the least privy or suspicion of any forgery.

Here was no fraud; no wrong. It was incumbent upon the plaintiff, to be satisfied, "That the bill drawn upon him *was the drawer's hand*," before he accepted or paid it: but it was not incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him: and he sends his servant to pay it and take it up. The other bill, he actually accepts: after which acceptance, the defendant innocently and *bona fide* discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and then found out "That they were forged;" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one

The Drawee of a Bill or Check Must Know the Handwriting of the Drawer.—The rule is well settled that the drawee of a check is bound, at his peril, to know the handwriting of the drawer; and if he pays a check to which the signature of the drawer was forged, *he* must suffer the loss, as between himself and the drawer, or an innocent holder to whom he has made payment. As between himself and the drawer, he undertakes that he will pay no checks, except such as have the genuine signature of the drawer, which he assumes and is presumed to know.

The drawee is presumed to know or to be acquainted with the signature of the drawer and will not be permitted to recover the money back from an innocent holder who is not presumed to know or to have such knowledge.

Drawee not Presumed to be Acquainted with the Handwriting in the Body of a Bill or Check.—While the drawee is presumed to be acquainted with the handwriting of the

innocent man upon another innocent man: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

RULE.—That the postea be delivered to the defendant.

drawer, there is no presumption that he is acquainted with the handwriting in the body of the bill or check, in as much as these contracts are often filled up in the handwriting of persons other than the drawer. If the rule were otherwise, the drawee could never safely pay a check filled up in a handwriting that was new to him, until he had first satisfied himself by inquiry from the drawer, whether the contract had been properly filled up. Such a rule would greatly interfere and delay commercial transactions and would to a very large extent defeat the very purpose for which these contracts were created. The rule is, therefore, well settled, that if the drawee, in good faith, and without negligence, pay even to an innocent holder a bill or check, which has been fraudulently altered in its body,—in amount—after it left the hands of the drawer, he will, ordinarily, be entitled to recover back, from the persons to whom it was paid, the excess over the true amount of the check. In the *Bank of Commerce v. Union Bank*, 3 Const., 234, Ruggles, J., in discussing this specific question says: “The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer’s signature, which he is not, afterwards, at liberty to dispute. The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer (drawee), from his imputed negligence, must bear the loss.” To support this statement Ruggles, J., cites *Price v. Neal*, *supra.* and *Wilkinson v. Suteridge*, 1 Strange, 648. See for a general discussion of these questions, *U. S. Bank v. Bank of Georgia*, 10 Wheaton, 333, 353; *Canal Bank v. Albany Bank*, 1 Hill, 287, 295; *Redington v. Woods*, 45 Cal., 406, 418; *Holt v. Ross*, 54 N. Y., 472, 475; *Peoria Ry. Co. v. Neill*, 16 Ill., 269, 270; *McKleroy v. Southern Bank*, 14 La. An., 458; *Jenys v. Fowler*, 2 Strange, 946 (1732); *Ellis v. Ohio Life etc., Co.*, 4 Ohio St., 628; *Goetz v. Bank*, 119 U. S., 556.

What the Drawee Warrants or Admits by Accepting a Bill—The General Rule.—It may be stated as a general rule that the drawee by his acceptances admits and is therefore estopped from denying:

1. The signature of the drawer.
2. That he has funds, in his hands, of the drawer with which to pay the bill.
3. That the drawer has capacity to draw, *i. e.*, that the drawer is not an infant, a bankrupt, or a fictitious person; and
4. That the payee named in the bill has full capacity to indorse the bill. *Hortsmann v. Henshaw*, 11 How., 177; *Braithwaite v. Gardnier*, 8 Q. B., 473; *Taylor v. Croker*, 4 Esp., 189; *Drayton v. Dale*, 2 Barn. & C., 293.

SECTION 32.

THE DRAWEE, BY ACCEPTING A BILL, IS NOT THEREBY ESTOPPED FROM SHOWING, SUBSEQUENTLY, THAT THE BODY OF THE BILL HAS BEEN ALTERED.

BANK OF COMMERCE v. UNION BANK.¹

IN THE COURT OF APPEALS OF NEW YORK, APRIL, 1850.

[*Reported in 3 Comstock, 230; 3 N. Y., 230.*]

The Form of Action.—The Bank of Commerce brought assumpsit in the Superior Court of the city of New York, against the Union Bank, to recover money paid by mistake. On the trial before Sanford, J., the case was this:

On the 18th of December, 1847, the New Orleans Canal and Banking Company drew a draft on the Bank of Commerce in New York, payable to the order of "J. Durand," for one hundred and five dollars. After the draft was issued it was fraudulently altered in several respects, and among others, by the substitution of the word "thousand" for "hundred," and the name "Bonnett" instead of "Durand," so that it appeared to be a draft for one thousand and five (instead of one hundred and five) dollars, and payable to the order of J. Bonnet (instead of J. Durand). In this altered condition the Union Bank in New York received the draft from the State Bank of Charleston for collection, and credited the amount to that bank. The Bank of Commerce, on the draft being presented by the Union Bank, paid it to the latter. Two days afterwards the Bank of Commerce received advices from the New Orleans Canal and Banking Company, and then ascertained the alterations in the draft. Thereupon the draft was returned to the Union Bank, and the money, which had been paid, demanded; but payment was refused.

The evidence being closed, the court charged the jury

¹ This case is also cited in Daniel on Negotiable Instruments, 533, 349a, 540, 1361, 1362, 1384, 1654a, 1651, 1659; Norton on Bills and Notes, 58, 143, 145, 148, 238; Story on Bills of Exchange, 113, 264; Tiedeman on Commercial Paper, 230, 394, 399, 451; Benjamin's Chalmers on Bills, Notes and Checks, 215; Bigelow on Bills and Notes, 188.

that if they were satisfied the draft had been altered in the manner before mentioned, after it was issued by the drawers, and that the plaintiffs paid the amount of it, as altered, by mistake, and without knowledge of or reason to suspect the alterations, they were entitled to recover the amount of money so paid. Also that the rule requiring a banker to know the handwriting of his customer, as to the signature to a check or draft, did not extend to the filling up of the body thereof; and that paying the draft in question under the circumstances was not of itself evidence of any negligence or want of due caution on the part of the plaintiffs. There was an exception to the charge and to the refusal of the court to charge certain propositions as requested. The plaintiffs had a verdict for \$1,035.38, which the Superior Court refused to set aside, and after judgment the defendants appealed to this court.

The Claim of Appellants.—The appellants claimed:—

1st. That there is no rule that the banker must know the handwriting of his customer as to his signature, but the rule is “that the banker shall take care that he do not pay away his customer’s money without sufficient authority for that purpose; and if paid on a forged order, he must bear the loss, and it is immaterial whether the order was forged wholly or in part. It is the banker’s duty to see that the check is genuine in all respects.¹ The attempt to establish the principle that a different degree of scrutiny is required in examining the body of a draft by the person on whom it is drawn, from that required in examining the signature of the drawer, is utterly fallacious and ought to be discountenanced.

2d. The second proposition laid down in the second division of the judge’s charge, is “that paying the draft, under the circumstances, was not of itself evidence of any negligence or want of due caution on the part of the plaintiffs.” This assumes that which it is the province of the jury to find. The jury were to judge of circumstances, and of negligence or no negligence.²

¹ Hall v. Fuller, 5 Barn. & Cress., 750; Chitty on Bills, 288, ed. of 1839; see also Smith v. Mercer, 6 Taunt., 75.

² Price v. Neal, 3 Burr., 1355.

3rd. The court erred in refusing to charge the jury, as requested, that the drawee of a draft is bound, before accepting or paying the same, to know its genuineness, and it is negligence in him not to inform himself whether the draft is genuine or not; and if he accepts or pays it (unless upon misrepresentation), that is, an admission of its genuineness, which concludes him.¹

4th. Even if there was no negligence on the part of the plaintiff—still, if there were none (and no fraud) on the part of the defendants, there is no reason why one innocent party should suffer rather than the other, and the law therefore leaves the parties in the same condition in which it found them.² If, when the defendants presented the draft in question for payment, they held it in good faith, and for a valuable consideration; or if the party from whom they received it so held it, when he passed it to them, and if upon such presentation the plaintiff's bank paid the amount of it to them, without being induced to do so by any fraud, deceit, or untrue representation of the defendants, this action could not be maintained.

5th. The only ground upon which the respondent claims a right to recover in this case, is that the amount of the altered draft was paid by mistake. That action can only be maintained where it is against conscience for the defendant to retain the money. Here there is no pretense that the appellants can not conscientiously retain the money, for they have paid out in good faith, and without fault, all that they claim of respondents.³

The Claim of Respondents.—The respondents claimed:

¹ Price v. Neal, 3 Burr., 1355; Markle v. Hatfield, 2 John., 462, last paragraph in opinion of Kent, C. J.; Bass v. Kline, 4 Maule & Selwyn (opinion of Dampier, J.), p. 15; Smith v. Mercer, 6 Taunt., 75; Story on Bills, § 113; U. S. Bank v. Bank of Georgia, 10 Wheat., 333.

² Cases before cited, and Bank of Gloucester v. Salem Bank, 17 Mass., 33.

³ See rule laid down by Ld. Mansfield in Price v. Neal, before cited; Brisbane v. Dacres, 5 Taunt., 142; Moses v. Macfarlan, 2 Burr., 1012.

1st. That where money is paid under mistake of facts it may be recovered back.¹

2d. The Bank of Commerce paid the money through mistake of facts. The forged alterations in the amount of the draft being without their knowledge at the time they paid it, they are entitled to recover back the sum paid. *The rule requiring a banker to know the signature of his customer to a check or draft, does not extend to the filling up of the body of the instrument.*² So where a party has procured payment of forged or altered paper without indorsing his name on it, yet he must pay back the money, although he may have paid it over to the party of whom he was the agent.³

3rd. The party paying has a right to recover his money as well where the forgery is that of the indorser's name, as where it is an alteration of the amount for which the bill was drawn. In this case the draft was assignable only by the indorsement of Durand, in whose favor it was drawn. It lacks that indorsement, and no title therefore ever passed either to the Charleston Bank or to the Union Bank.⁴

4th. There is an implied warranty in the transfer of every negotiable instrument that it is not forged—and the actual indorsement of this draft by the Union Bank, was an express averment, and a guaranty to the Bank of Commerce that it was not forged or altered. It was an assurance of its

¹Chit. on Cont., Am. ed. of 1844, p. 626, and cases cited in notes; Chitty on Bills, Am. ed. of 1849, p. 425; 2 Smith's Lead. Cas., p. 237, Law Lib., vol. 28, new series, p. 269, and notes; Potter v. Everett, 2 Hall, 252; Mowatt v. Wright, 1 Wend., 355; Burr v. Veeder, 3 id. 412; Waite v. Leggett, 8 Cowen, 195; Union Bank v. U. S. Branch Bank, 3 Mass., 74; Garland v. Salem Bank, 9 id. 389; Lazell v. Miller, 15 id., 207.

²Chitty on Bills, ed. of 1849, p. 245, and cases cited; Jones v. Ryde, 5 Taunt., 488; Bruce v. Bruce, id. 495; Merchants' Bank of New York v. Exchange Bank of New Orleans, 16 Louis Rep., 457.

³Fuller v. Smith, 1 C. & P., 197; S. C. Ryan & Moody, 49; Chitty on Bills, ed. of 1849, p. 245.

⁴Chitty on Bills, ed. of 1849, p. 260, and cases cited; Smith v. Chester, 1 Term. Rep., 654; Dick et al. v. Leverich, 11 Louis. Rep., 573; Canal Bank v. Bank of Albany, 1 Hill, 287; Talbot v. Bank of Rochester, 1 id. 295; Cogill v. Am. Ex. Bank, 1 Comst., 11.

genuineness in every respect, save the signature of the drawer.¹

Decision.—The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute; and therefore if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee can not compel the holder to whom he paid the bill, to restore the money, unless the holder be in some way implicated in the fraud.² This rule is founded on the supposed negligence of the drawee in failing by an examination of the signature, when the bill is presented, to detect the forgery and refuse payment. The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer, from this imputed negligence, must bear the loss. In *Price v. Neal*, the plaintiff had paid to Neal, the holder, two bills of exchange, purporting to be drawn on him by Sutton, whose name was forged. On discovery of the forgery, Price brought his action against Neal, to recover back the money as paid by mistake. *Ld. Mansfield* in delivering the opinion of the court in favor of the defendant, said, "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it, but it was not incumbent upon the defendant to inquire into it." "Whatever neglect there was, was on his side. It is a misfortune which has happened without the defendant's fault or neglect."

In *Wilkinson v. Lutwidge*,³ *Ld. C. J. Pratt* was of opinion that "acceptance was a sufficient acknowledgment of the drawer's handwriting on the part of the acceptor, who must be supposed to know the hand of his own correspondent." So the acceptance of a bill, whether general, or for honor, or

¹ *Chitty on Bills*, ed. of 1849, p. 245; *Jones v. Ryde*, 5 Taunt., 488; *Wilkinson v. Johnson*, 3 Barn & Cress., 428; *Herrick v. Whitney*, 15 John., 240; *Harris v. Bradley*, 7 Yerg., 310; *Story on Bills of Exch.*, §§ 110, 235.

² *Price v. Neal*, 3 Bur., 1354.

³ 1 Strange, 148.

supra protest, after sight of the bill, admits the genuineness of the signature of the drawer; and consequently if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding and entitle a *bona fide* holder for value and without notice to recover thereon according to its tenor.¹

But it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, *but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor.* In the present case, that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. *The signature is genuine. The forgery was committed by altering the date, number, amount and payee's name.* No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it.

The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face. Whether it was so or not, in this case, was properly submitted to the jury, who found that it was paid by mistake and without knowledge of or reason to suspect the fraudulent alterations. It would have been difficult to find otherwise upon the evidence, the bill having passed through the defendant's bank and the Charleston bank without suspicion. If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinize the bill, because they might have relied on the drawee's better knowledge

¹ Story on Bills, § 262.

of the hand; but the forgery being in the body of the bill, the plaintiffs were not more in fault than the defendants.

The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill each indorsee receives it on the credit of the previous indorsers; and it was the interest and the duty, in the present case, of the Bank of Charleston to satisfy itself that the bill was genuine, or that its immediate indorser was able to respond in case the bill should prove to be spurious. The party who fraudulently passed the bill can not avoid his liability to refund on the pretence of delay in detecting the forgery, or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require.¹

In *Smith v. Mercer*,² in *Cocks v. Masterman*,³ and in *Price v. Neal*,⁴ the plaintiffs who paid the forged bills, being chargeable with a knowledge of the signature of the drawer (which was forged) were held to have paid it negligently and without due caution and examination, and on that ground it was that the defendants to whom they paid the money were held not liable without immediate notice of the forgery. But in the present case no such negligence is imputable to the plaintiffs, the plaintiffs being no more capable of detecting the forged alteration by inspection of the bill, than either of the other parties.

This action is not founded on the bill as an instrument containing the contract on which the suit is brought. The acceptor can never have recourse on the bill against the indorsers. But the plaintiffs right of recovery rests on equitable grounds. In the *Canal Bank v. The Bank of Albany*, the principle was recognized that money paid by one party to another through mutual mistake of facts in respect to which both are equally bound to inquire, may be recovered back. The defendants here as in that case have obtained the money of

¹ *Canal Bank v. The Bank of Albany*, 1 Hill, 287, 292, 3.

² 6 Taunt., 76 (1814).

³ 9 Barn. & Cres., 902 (1827).

⁴ 3 Burr., 1354 (1762).

the plaintiffs without right and on the exhibition of a forged title as genuine, the forgery being unknown to both parties. The defendants ought not in conscience to retain the money, because it does not belong to them; and for the further reason that the defendants and the previous indorsers have, each, on the same principle, their remedy over against the party to whom they respectively paid the money, until the wrongdoer is finally made to pay. If that party should be irresponsible, or if he can not be found, the loss ought to fall on the party, who, without caution, took the bill from him.

In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill is excused, provided notice of the forgery be given as soon as it is discovered.

Judgment affirmed.

SECTION 33.

THE DRAWEE, BY ACCEPTING A BILL, THEREBY ADMITS OR WARRANTS THAT THE PAYEE HAS CAPACITY TO INDORSE, BUT DOES NOT ADMIT HIS INDORSEMENT.*

MEAD v. YOUNG.¹

IN THE KING'S BENCH, NOV. 18TH, 1790.

[*Reported in 4 Term. Rep., 28.*]

* In an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A. or order," it is competent to the defendant to give evidence that the person, who indorsed to the plaintiff, was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill. If a bill of exchange, payable to A. or order, get into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favor it was drawn, indorse it, he is guilty of a forgery.

¹This case is cited in Daniel on Negotiable Instruments, 692, 1345; Benjamin's Chalmers, Bills, Notes and Checks, 90; Wood's Byles on Bills and Notes, 148, 270; Chitty on Bills, 198, 156, 261, 391, 395, 641, 780, 784; Norton on Bills and Notes, 115, 243; Tiedeman on Commercial Paper, 266; Randolph on Commercial Paper, 251, 252. See also, Masters v. Miller, 4 Term Rep., 320; First Bank v. Burkham, 32 Mich., 328; Chambers v. Union Bank, 78 Pa. St., 205; McKleroy v. Southern Bank, 14 La. An., 458.

The Form of Action.—This was an action brought by the indorsee of a bill of exchange for 90*l.* against the acceptor. The bill was drawn at Dunkirk by Christian on the defendant in London, payable “to Henry Davis, or order;” and, having been put into the foreign mail inclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favor it was drawn. The defendant accepted the bill; and when Davis desired the plaintiff to discount it, the latter made application to the defendant to know whether or not it was his acceptance? and, on receiving an answer in the affirmative, coupled with an assurance that it was a good bill, he discounted it, not knowing the H. Davis from whom he took it. There was no ground to impute any fraud to the plaintiff. On the trial before Ld. Kenyon, after the plaintiff had proved the defendant’s handwriting, and the indorsement by Davis, the defendant offered evidence to show that the H. Davis, who indorsed to the plaintiff, was not the real H. Davis in whose favor the bill was drawn: but Ld. Kenyon being of opinion that such evidence was inadmissible, the plaintiff recovered a verdict. A rule having been obtained to show cause why a new trial should not be granted on this misdirection.

The Claim of the Plaintiff.—Ld. Erskine for the plaintiff argued that, if there had been any particular description of the payee on the bill, the plaintiff must have taken care that the person from whom he received it answered the whole of the description; but there was no description of, or addition to, the H. Davis; there was nothing on the bill to lead either the acceptor or any third person to suspect that the H. Davis, who was in possession of the bill, was not the real payee. And, so far from the plaintiff’s having incurred any charge of neglect, he seems to have taken more than ordinary caution in making inquiries of the acceptor before he discounted the bill. There is no pretense to impute either fraud or neglect to the plaintiff; he stands in the situation of an innocent purchaser for a valuable consideration. This case therefore falls within the common rule, that, where one of two innocent persons must suffer by the fraud of another, the loss must be borne by him who enabled the party to commit

the fraud; and in this case that person is Christian, who ought to have described the payee more particularly.

The Claim of Defendant.—In support of the rule it was argued that, a party, purchasing a bill of exchange, is, like the purchaser of any other species of property, bound to inquire into the title of him from whom he buys. No person can derive title to this bill but he who claims under the real H. Davis: and it is indifferent whether the person indorsing the bill be or be not of the same name with the real payee; in neither case can any property be transferred but by him who has the title. If he bear the same name, *prima facie* indeed he may be presumed to be the same person, till the contrary be shown: but here the question was, whether evidence should not have been received to prove the contrary? If such evidence be not admissible, it will follow that payment to a person of the same name with a legatee would discharge the executor, or a payment by a debtor to any person who had the same name as his creditor: but that cannot be pretended. This bill was drawn in order to satisfy a debt due from Christian to the real H. Davis; and yet payment of this bill to the plaintiff can never be considered as a discharge of that debt, without the indorsement of that H. Davis. In all cases where a bill is drawn payable to A. B. or order, it is indispensably necessary to prove the handwriting of the payee, which was not in fact done in this instance. The necessity of this proof is apparent from the form of the declaration: which after alleging that the bill was drawn in favor of H. Davis, avers that the said H. Davis afterwards indorsed to the plaintiff. If the negligence of either of the parties be resorted to as a ground for the determination of this case, the plaintiff seems to have been guilty of the greatest negligence in taking a bill from a person whom he did not know, whereas the transaction, as far as Christian was concerned, was carried on in the ordinary course of business. There is also another objection to the plaintiff's recovering, because he claims through a forgery: For the H. Davis, who received the bill inclosed in a letter from Christian, must have known that it was not intended for him; and the circumstance of his bearing the same name with the payee would be no defence to him on a

prosecution for forgery, since he put a false signature to an instrument with intent to defraud.

Decision.—The question here is, Whether the name of H. Davis, to whom the bill on the face of it was payable, shall or shall not convey a title to this plaintiff who gave a valuable consideration for it, and who discounted it with the name of H. Davis upon it, and with an assurance from the defendant that it was accepted by him? If any fraud, or even neglect, could be imputed to the plaintiff, that would vary the case; but, circumstanced as these parties were, I think that, if the plaintiff cannot recover, it will put an insuperable clog on this species of property. I cannot distinguish this case on principle from that of *Miller v. Race*,¹ where the innocent holder of a note, which had been taken when the mail was robbed, was held entitled to recover; that indeed was a note payable *to bearer*, but still the same principle must govern both cases. In this case the fault originated with the drawer of the bill, in not describing more particularly the person to whom he intended it should be paid. The plaintiff was not bound to send to Dunkirk to know whether the person, who had possession of the bill, was or was not the real H. Davis. There may indeed be some inconvenience the other way; but setting the inconvenience on the one side against that on the other, in my apprehension it would throw too great a burden on persons taking bills of exchange to require proof of an indorsee that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action: and therefore I think that, as there was no fraud, or want of due diligence on the part of the plaintiff, he is entitled to recover; however, I give this opinion with some diffidence, as my brothers have intimated that they are of a different opinion.

Ashhurst, J., said, “This is a case of considerable importance; and I think that we ought to grant a new trial, that the parties may have an opportunity of putting the question on the record. The present inclination of my opinion is with the defendant. In order to derive a legal title to a bill of exchange, it is necessary to prove the hand-writing of the

¹ 1 Burr., 452 (1758).

payee; and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery; and no title can be derived through the medium of a fraud or forgery. This is distinguishable from the case of *Miller v. Race*; for there the note was payable to bearer. In such cases the bearer, who purchases for a valuable consideration, and without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge to the drawer. But in this case the bill was drawn payable to H. Davis, or order; and though the name of H. Davis was indorsed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be satisfied that that was the indorsement of the real payee."

Buller, J., said, "As the bill in this case is of great value, the parties may put this question in a mode to be decided by the *dernier resort*. As at present advised, I entertain the same opinion as my Brother Ashhurst. If we were to inquire whether any laches were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more in fault than any other person, in advancing his money to H. Davis, who was a total stranger to him. But, without going into any such inquiry, I am of opinion that it is incumbent on a plaintiff, who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable. The general form of the declaration shows that it is so; for that is that, 'the said A. B. to whom, or to whose order, the payment of the said sum of money mentioned in the said bill was to be made, afterwards, etc., indorsed the said bill, his own proper handwriting being thereto subscribed.' Now here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable; and no indorsement by any other person will give any title whatever. Then, is there any thing in this case that estops the defendant from saying that the person who indorsed to him (plaintiff) was not the real payee? Now the act of that person who indorsed, and who in so

doing was guilty of a forgery, cannot prevent an innocent person from showing the truth.

“Then it was argued that Christian was guilty of negligence, in not describing more particularly the payee; but I know of no authority which requires that to be done. This bill was drawn in the common form, payable ‘to H. Davis or order;’ and the drawer could not foresee that it would get into the possession of any other H. Davis. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill, and it cannot make any difference whether such stranger bear the same name with the real payee or not; for no person can give title to a bill but he to whom it is made payable. Independently of these reasons, I think that convenience requires that the determination should be in favor of the defendant. I have no difficulty in saying this H. Davis, knowing that the bill was not intended for him, was guilty of a forgery; for the circumstance of his bearing the *same name* with the payee cannot vary this case, since he was not the *same person*. Then if the plaintiff cannot recover on this bill, he will be induced to prosecute the forger; and that would be the case even if it had passed through several hands, because each indorser would trace it up to the person from whom he received it, and at last it would come to him who had been guilty of the forgery: whereas if the plaintiff succeed in this action, he will have no inducement to prosecute for the forgery: the drawer, on whom the loss would in that case fall, might have no means of discovering the person who committed the forgery, and thus he would probably escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But at all events the plaintiff cannot recover, since he derives his title under a forgery.”

Grose, J., said, “I am of opinion that it was competent to the defendant to show in evidence that the person, who indorsed to the plaintiff, was not the person named as the payee in this bill of exchange; and I form that opinion as well on the substance of the transaction as on the form of pleading in such cases. A bill of exchange is only a transfer of a chose

in action according to the custom of merchants; it is an authority to one person to pay to another the sum which is due to the first, and it is generally directed to be paid to the payee or his order. When the person, on whom it is drawn, accepts, he only engages by the terms of his acceptance to pay the contents of the bill to the person named in it, or to his order. The general form of the declaration, which is to be found in some of the old entries, also agrees with this doctrine, and points out what the law is.

“I observe indeed that this declaration is not drawn in the usual form, for the words ‘to whom or to whose order’ are omitted; but still it is that the said H. Davis, that is the same H. Davis who is mentioned in the former part of the declaration as the payee, indorsed to the plaintiff. It clearly, therefore, appears that as no person can demand payment of a bill of exchange but the payee, or the person authorized by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person. If he pay the amount of the bill to any other person, he pays it in his own wrong, and such payment does not discharge his debt to the drawer. If this decision will prove a clog on the circulation of bills of exchange, I think it will be less detrimental to the public, than permitting persons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we consider the definition of it; which is, *the false making of any instrument, indorsement, etc., with intent to defraud.*¹ It makes no difference whether the person making this false indorsement was or was not of the same name with the payee, since he added the signature of H. Davis, with a view to defraud, and knowing that he was not the person for whom the bill was intended. I agree also with my Brother Buller, that this decision will be more convenient to the public; because then the plaintiff will prosecute the person, who indorsed to him, for the forgery. For these reasons I am of opinion that, as this bill of exchange was only payable to the payee or his order, it was competent to the defendant, the

¹Vid. 2 Geo. 2 c., 25, S. 1.

acceptor, to inquire whether the person under whom the plaintiff claims, was or was not the payee."¹

Rule absolute.

¹ See the following cases for a further discussion of this general proposition: *Robarts v. Tucker*, 16 Q. B. (Ex. Ch.), 560; *Lawrence v. Russell*, 77 Pa. St., 460; *Graves v. American Bank*, 17 N. Y., 205; *Welsh v. Bank*, 73 N. Y., 424; *Gale v. Miller*, 54 N. Y., 536; *Arnold v. Check Bank*, 1 L. R. C. P., 578; *National Park Bank v. Ninth National Bank*, 46 N. Y., 77; *Braithwaite v. Gardiner*, 8 Q. B., 473; *Marine National Bk. v. National City Bk.*, 59 N. Y., 67; *White v. Continental Bk.*, 64 N. Y., 316; *Reddington v. Woods*, 45 Cal., 406; *Henertematte v. Morrie*, 28 Hurr., 77.

CHAPTER VII.

Methods of Transferring Commercial Contracts.

SECTION 34.

General Methods of Transfer.—It may be said that there are but two general methods of transferring commercial contracts;—*first*, by the act of the parties; and, *second*, by operation of law. Under the first method might be mentioned three others, which constitute the most general methods:

- a.* By assignment;
 - b.* By indorsement; and
 - c.* By delivery simply.
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SECTION 35.

Assignment Defined.—An assignment in the sense we have used it here means the act by which one person transfers to another his right, interest and property in bills of exchange, promissory notes, bonds and other commercial contracts. By an assignment of a commercial contract, the assignee gets the interest which the assignor hath. An assignment differs from an indorsement in this, that the assignee takes the *rights of the assignor*, while the indorsee (if he is a *bona fide* holder) gets all the *rights represented by the terms of the contract*. The assignee may not receive any rights whatever, depending altogether upon the right of the assignor; while the indorsee secures the rights represented by the terms of the contract without reference to the rights of the indorser. Negotiable contracts are transferred by indorsement.

At common law the transfer of a chose in action or right to a thing not in possession was forbidden, as violating the rules against champerty and maintenance, and because the man could not sell a thing which he did not have. Such an

assignment or transfer was considered as passing to another a mere right to recover in a suit at law, and as the ancient law abhorred litigation, it prevented the sale of possibilities or rights in action, and refused to recognize the title of the assignee when he sought to recover in a suit at law. Coke. Lit., 266a.

SECTION 36.

Common Law Rule Abrogated.—The stringent rule, of the common law courts, has long since been disregarded by the courts of equity and now in that court, assignments of choses in action, will be protected and enforced. In courts of equity the assignee is regarded as the true owner of the thing assigned (the chose in action) and is entitled to use it for his own purposes subject to equities, of course, if there are any. Experience has taught that the grave apprehension of the common law courts, that actions would be multiplied; that the rules against champerty and maintenance would be violated and that justice would be trodden under foot, if property in action should be transferred, has never been realized and the supposed difficulties are no longer entertained.

Experience has not only taught the courts that no evil results from the assignment of things in action, negotiable contracts, etc., but upon the contrary the permission to transfer these contracts (property in action), as well as property in possession has resulted in great public good and private convenience. *Thalheimer v. Brinckerhoff*, 20 Johnson (N. Y.), 380; *Bacon v. Bouham*, 33 N. J., eq., 614; *Wright v. Wright*, 1 Ves. R., 411.

SECTION 37.

Interest Received by an Assignee.—An assignment, as applied to the transfer of negotiable contracts or negotiable paper, is the transfer of the interest or equities which the holder hath therein; while an indorsement, as will be explained later, is a transfer of the title in a negotiable contract by writ-

ing, on the back thereof. No particular or precise form of words are necessary to constitute an indorsement or an assignment. *Row v. Dawson*, 1 Vesey, 331.

Any words which show an intention to transfer the title or interest will be sufficient. An assignment may be either by parol or in writing. *McWilliams v. Webb*, 32 Iowa, 577; *Jordon v. Gillen*, 44 U. S. St., 424; *Noyes v. Brown*, 33 Vt., 431.

An indorsement must always be in writing. The same act may be either an assignment or an indorsement depending upon the nature of the contract transferred. For instance, if the particular contract is a negotiable one, then the writing of the name, merely, of the payee across the back of it, or across the face will be an indorsement; while the same act, upon a non-negotiable contract, one not containing the indicia of negotiability, will amount to an assignment and will transfer the holder's interest therein only, and not the right represented by the terms of the contract. In all cases, however, whenever it appears upon the contract transferred, that it was the intention of the parties to the agreement that the transaction was to have been an assignment, the courts will give their act that effect and protect the interest of the parties accordingly. *Pass v. McCrea*, 36 Miss., 143.

Non-Negotiable Contracts Transferred by Assignment Only.—The only method of transferring non-negotiable contracts is by assignment; but negotiable contracts may be transferred by assignment or by indorsement if the parties so intend. The transfer of a negotiable contract payable to the order of the payee, without indorsement in the first instance, by the original payee or holder, would be an assignment of that contract, and passes the *equitable title* only, and the person to whom it is thus transferred may be subjected to all the equities that attached to it in the hands of the transferer. *Quigley v. Mexico So. Bank*, 80 Mo., 295; *Faris v. Wells*, 68 Ga., 604.

The assignee stands in the shoes of the assignor and his right to recover upon the contracts assigned, is subject to the defenses which were available against the latter, even though he took the contract upon consideration and in good faith.

Matteson v. Morris, 40 Mich., 55; Spinning v. Sullivan, 48 Mich., 8; Foreman v. Beckwith, 78 Ind., 575; Weber v. Orten, 91 Mo., 677; Calvin v. Sterrett, 41 Kan., 218.

SECTION 38.

Assignment—Action by Whom—The Rule at Common Law—The Equity Rule.—At common law the transferee of these contracts, if he desired to sue upon them, was obliged to bring the action in the name of the assignor. In equity, however, a different rule prevailed and he was there permitted to sue in his own name. By statute, now, in all the states, the equity rule has been adopted so that the holder, the real party in interest, may maintain the action, upon such contracts, in his own name. *Grand Gulf Bank v. Wood*, 12 S. & M., 482. *Wheeler v. Wheeler*, 9 Cow., 34.

The Requirements in Case of an Assignment.—There are certain duties imposed upon the assignee which are not imposed upon the indorsee or one who takes a negotiable instrument by indorsement. He is required to give notice, to the debtor (if he desires to protect himself) that he has become the holder of the particular contract. This notice should be given as soon as convenient in order that the assignee may be protected against possible equities which may arise after the transfer. The notice will not of course, relieve him from the offset,—equities and other defenses,—which might have been raised against him at the time of the transfer, and before the notice. *Wood v. Brush*, 72 Cal., 224; *Kinderly v. Jervis*, 22 Beav., 31; *Barrow v. Porter*, 44 Vt., 587; *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn., 141.

Upon the question of the necessity of giving notice to the debtor of the assignment of a chose in action there is much conflict in the authorities. In *Clodfelter v. Cox*, McKinney, J., says, "There is an irresistible conflict of authority upon this subject. The weight of American authority seems to be that the assignment of a chose in action is complete in itself, and vests a perfect title in the assignee as against third persons, without notice of assignment to the debtor. But the contrary of this is the settled doctrine of the English

as well as some of the courts of this country at the present day. The latter we consider as the more reasonable and safe practical rule, and have accordingly held on more than one occasion, that the assignment of a chose in action is not complete, so as to vest the title absolutely in the assignee, until notice of assignment is given to the debtor; and this not only as regards the debtor, but likewise as to third persons. And, therefore, as between subsequent purchasers or assignees of a chose in action, he is entitled to preference who first gives notice to the debtor, although his assignment be subsequent to that of the other. To perfect the assignment not merely as against the debtor, but also as against creditors and subsequent *bona fide* purchasers notice must be given." 1 Sneed (33 Tenn.), 339; Pickerring v. Ilfracomb R. R. Co., 3 Law Rep., C. P., 235; Thayer v. Daniels, 113 Mass., 131; Muir v. Schenck, 3 Hill, 230.

Notice Must be Given by the Assignee or his Lawfully Authorized Agent.—The notice of assignment should be given by the assignee or his agent. Dale v. Kimpton, 46 Vt., 76.

SECTION 39.

Assignee Takes Subject to Equities.—No rule is better settled than that the assignee of a chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should exist at the inception of the debt or contract. It is sufficient if they exist prior to the assignment; for the reason that the rule is as applicable to one case as to the other; which is that the assignee has it in his power to protect himself against them by inquiring of the debtor before the assignment. Chancellor Kent, in Murray v. Sylburne, says "the assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action, which he is about to purchase from the obligee." 2 Johnson's Ch., 441; York v. McNutt, 69 Am. Dec., 607; Polk v. Gallant, 34 Am. Dec., 410.

SECTION 40.

What is Meant by "Equities Which may be Interposed Against the Assignee."—What we mean by the phrase "equities which may be interposed against an assignee" are all those defenses which existed between the original parties, and which grew out of some defect inherent in the contract itself, and which renders the contract invalid in whole or in part between the original parties, such as fraud, illegality or duress or where the consideration has failed or in case of payment or accord and satisfaction. Against these equities an assignee cannot be a *bona fide* holder. Some of these defenses (equities) may and others may not be interposed against a *bona fide* indorsee. (See Post Chap. on Defenses).

We have said that these "equities" relate to defenses existing between the "original parties." Upon the question whether the "equities" which exist between the "original parties" are the only ones which can be interposed, or whether all the equities which exist between the subsequent parties may be interposed as well, there is much conflict of authority. Theodore W. Dwight in discussing this rule said, "The rule is not simply that the assignee takes subject to the equities between the original parties though that is sound law. It goes farther than this, and declares that the purchaser of a chose in action must always abide the case of the person from whom he buys. The "reason of the rule," he continues, "is that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and this capacity is to be exactly measured by his own lights." *Trustees of Union College v. Wheeler et. al.*, 61 N. Y., 88 at 105; *Owen v. Evans*, 134 N. Y., 514; *Schafer v. Reilly*, 60 N. Y., 61; *Ingraham v. Disborough*, 47 N. Y., 421; *Green v. Warnick*, 64 N. Y., 220; *Davies v. Austen*, 1 Vesey Jr., 247; *Durton v. Benson*, 1 P. Wm., 497; *Barney v. Grover*, 28 Vt., 391; *Jeffries v. Evans*, 6 B. Mon., 119; *Boardman v. Hayne*, 29 Ia., 339; *Hill v. Shields*, 81 N. C., 250; *Warner v. Whitaker*, 6 Mich., 133; *Tinmes v. Shannon*, 19 Iowa, 296; *Robeson v. Roberts*, 20 Ind., 155; *Summers v. Hutson*, 48 Ind., 230; *Watt v. Clark*, 9 Pa. St., 399; *Hill v. Caillone*, 1 Ves.

Sr., 122; Norton v. Rose, 2 Wash. (Va.), 233; Crosby v. Tanner, 40 Iowa, 136; Duke v. Clark, 58 Miss., 466; L. R., 5 Ch. App., 358; Sutherland v. Reeve, 151 Ill., 384; 38 N. E. Rep., 130; Commercial Nat. Bank v. Burch, Receiver, and Burch, Receiver v. Kalamazoo Paper Co., 141 Ill., 519; The Mullanphy Sav. Bank v. Schopp et. al. v. Magloughlin, 133 Ill., 33; Stephens v. Weldon, 151 Pa. St., 520; Rice v. Hearn, 109 N. C., 150. This doctrine is disputed, see post section 41.

SECTION 41.

What Equities may be Interposed Between Parties—Latent Equities.—While it is no doubt the general rule that the assignee takes the contract burdened with *all* the equities against it there is an imposing line of authorities, which hold that the assignee takes the contract freed from all equities except those which existed between the original parties in its inception.

Chancellor Kent, however, in a dissenting opinion in the case of *Beebe v. Bank of New York*, says “when it is said that an assignee of a chose in action takes it subject to all equity, it is meant only that the *original debtor can make the same defence against the assignee that he could against the assignor*; the rule has never received any other application.” 1 Johnson, 529 at 572 (or 574 star pages); *Livingston v. Dean*, 2 Johns Ch., 479; *Murray v. Lylburn*, 2 Johns Ch., 441; *Ohio Life Ins. Co. v. Ross*; 2 Md. Ch., 25, 39; *Sleeper v. Chapman*, 121 Mass., 404; *Bloomer v. Henderson*, 8 Mich., 395; *Bush v. Lathrop*, 22 N. Y., 535; *Pomeroy’s Equity Jurisprudence*, Secs. 703–715; *Bispham’s Principles of Equity*, 171.

The defenses or equities, which arise between the subsequent parties are contra-distinguished from those existing between the original parties only, as latent equities.

CHAPTER VIII.

Indorsement.*

SECTION 42.

AN INDORSEMENT MUST BE IN WRITING AND UPON THE COMMERCIAL CONTRACT INDORSED.

FRENCH *v.* TURNER.¹

IN THE SUPREME COURT OF INDIANA, NOVEMBER 27th, 1860.

[*Reported in 15 Indiana, 59.*]

The Form of Action.—The first count states in substance, that on November 6, 1852, one John Bodle executed and delivered to Abel C. Pepper, a mortgage on certain land, therein described, to secure the payment of \$1,100, evidenced by ten promissory notes of that date, each for \$110; one payable in a year from date, and one maturing each year there-

¹ This case is cited in Daniel on Negotiable Instruments, 689a, 690, 748a; Benjamin's Chalmers on Bills, Notes and Checks, 117, 125; Tiedeman on Commercial Paper, 247, 264, 305; Wood's Byles on Bills and Notes, 252; Norton on Bills and Notes, 108; Ames on Bills and Notes, (Vol. 1) 228. See also Ryan *v.* May, 14 Ill., 49; Kuler *v.* Williams, 49 Ind., 504.

***Indorsement—Defined.**—An indorsement is the writing of the name of the holder upon a commercial contract with the intent (1) either to transfer the title thereto, or (2) to strengthen the security, or both, by which act he becomes conditionally liable for the payment of such contract. Daniel, in his valuable work on Negotiable Instruments, says, "Indorsing an instrument, in its literal sense, means writing one's name on the back thereof; and in its technical sense, it means writing one's name thereon with intent to incur the liability of a party who warrants the payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser." Dan. on Negot. Inst., sec. 666; Higgins *v.* Bullock, 66 Ill., 37; Sigourney *v.* Clarke, 17 Conn., 519.

after until they all become due, with interest payable annually. That in September, 1854, Pepper assigned and transferred the mortgage and notes, by indorsement *on the mortgage*, to the defendant, Turner. That Turner, in January, 1858, for value received, transferred the mortgage and notes to the plaintiff, by indorsement in writing *on the mortgage*. The mortgage and notes, together with the assignment, are set out. The

The California Code says, "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to any other person, is called an indorser, and his act is called an indorsement." Sec. 3108 of the Civil Code.

The fact that a guaranty is written on the back of a note above the signature of the payee, does not have the effect of preventing the signature from operating as an indorsement. *Nat. Bank v. Galland*, 45 Pac. Rep., 35.

An indorsement in its technical sense applies only to negotiable contracts. It is an independent contract from the contract upon which it is made and is equivalent to the drawing of a new bill upon the maker, drawee or acceptor as the case may be. It is an independent contract in the sense that its validity may be attacked independently from the original contract and in the same manner and under the same circumstances that any other contract may be attacked. At common law the indorser could not be sued in the same action with the original parties to the contract. This rule, however, is now changed so that the indorser and maker may be sued together. An indorsement must be supported also by a distinct consideration. An indorsement, or what would amount to an indorsement of a negotiable note, will be but an assignment when applied to a non-negotiable contract. *Merchants Nat. Bank v. Gregg* (Mich.). 64 N. W. Rep., 1052; *Steere v. Trobilock et al.*, 66 N. W. Rep., 342.

The Mode of Indorsement.—There is no required form for an indorsement. It is done by simply writing the indorser's name upon the back of the contract. It must be in writing and upon the instrument itself or upon a paper attached thereto. *Folger v. Chase*, 18 Pick., 63; *French v. Turner*, *supra*.

The following statements have been held to be indorsements when written upon negotiable instruments: "I hereby assign all my right and title to Mr. —." *Sears v. Lautz*, 47 Ia., 658; "I assign the within note to Mrs. —." *Sands v. Wood*, 1 Ia., 263; "I hereby transfer my right, title and interest of the within note to S. A. Y." *Aniba v. Yeomans*, 39 Mich., 171; "For value received, I hereby assign all interest in and to this note to Mr. —." *Stevens v. Hannan*, 86 Mich., 307; 48 N. W. Rep., 951; *Markey v. Carey*, 108 Mich., 184; 66 N. W. Rep., 493; "For value re-

assignment from Turner to the plaintiff, *on the mortgage*, is as follows, viz.:

"For value received, I hereby assign the within mortgage and notes, therein described, to John J. French.

"January 2, 1858. (Signed) Moses Turner."

It is averred that the note which became due on November 6, 1858, and the interest on the other not due, remain due

ceived I hereby assign, transfer and set over to D. B. T. all my right, title and interest and claim in the within note." Hall v. Toby, 110 Pa. St., 318; Adams v. Blethen, 66 Me., 19; Hatch v. Barrett, 34 Kan., 230; 8 Pac. Rep., 129; Davidson v. Powell, 114 N. C., 575.

To Whom a Commercial Contract May be Indorsed.—

A bill or note may be indorsed by the holder or owner to any one. And it does not matter whether the indorsee is laboring under any disabilities, such as infancy, lunacy, or coverature, or not. At common law, however, if a bill or note was indorsed to a married woman, it became the property of her husband. Story on Notes, sec. 126. But in case the wife should survive the husband then she may sue in her own name, provided the husband does not reduce the note to possession and secure the payment of the same.

Negotiable contracts may also be indorsed or transferred to executors any administrators, trustees and agents, as such. If, however, the indorsement is made to the personal representatives it will operate as an indorsement to them personally. The same is true in the case of trustees. At common law the husband could not indorse a contract to his wife except as her agent. Dan. on Negot. Inst., sec. 686; Schmittler v. Simons, 101 N. Y., 554; Pinney v. Adm'rs, 8 Wend., 500; Parsons on B. & N., vol. 1, p. 161; Cornthwaite v. First Nat. Bk., 57 Ind., 268.

If a commercial contract is indorsed to the agent of a private corporation as such, it will be regarded *prima facie* as an indorsement to the corporation. Dugan v. U. S., 3 Wheaton, 172; Fleckner v. Bank, 8 Wheat., 360.

The Indorsement Must be of the Entire Instrument.—

The indorsement must be an indorsement of the entire instrument. If, however, a part has been paid it may be indorsed as to the residue. Daniel on Negotiable Instruments, 668; Hawkins v. Cardy, 1 Ld. Ray., 360; Byles on Bills, 291. An indorsement which purports to transfer a part only of the amount payable, does not operate as a negotiation of the instrument. If a part of the note has been paid then of course the action may be an indorsement of the residue. Hughes v. Keddell, 2 Bay (S. Car. Rep.), 324.

Indorsement—When Necessary.—It is well settled that commercial contracts payable "*to order*" cannot be negotiated in

and unpaid. That, for the notes which matured before November 6, 1858, he foreclosed the mortgage, and the mortgaged premises were sold for \$600, being fifty dollars less than the amount of the judgment, interest and cost. That Bodle, at the time of the execution of the notes and mortgage, had no property subject to the execution except the mortgaged premises, nor did he have at the time of the maturity of any

the first instance, except by the indorsement of the payee or holder or his legal representative so as to pass to the holder both the *legal* and *equitable* title. If, however, the note payable to order has been once indorsed in blank by the payee, it then becomes payable to bearer and may be negotiated without indorsement, because it is then equivalent to a note payable to "bearer."

The Effect of the Transfer of a Bill or Note Payable to Order Without Indorsement.—The transfer of a commercial contract payable to order without indorsement by the payee, is a mere assignment of the contract and the transferee may be subjected to all the equities existing under such contracts. *Lancaster v. Baltzell*, 7 G. & J., 468; *Smalley v. Wight*, 44 Me., 442; *Dubuc v. Voss*, 19 La., Andrew, 210.

In all other cases of commercial contracts than those payable to order, and where the indorsement is special or in full, they may be transferred without indorsement. If, however, other negotiable contracts than those payable to order are indorsed, the indorser incurs the same liability. While an indorser may limit his liability by the nature of his indorsement, he cannot restrain the negotiability of a commercial contract by his indorsement. *Johnson v. Mitchell*, 50 Tex., 212.

Indorsement, May be Explained by Parol Evidence.—**When.**—The rule of evidence which provides that parol evidence is inadmissible to vary or contradict the terms of a written contract applies to commercial contracts in general, and to contracts of indorsements where they are regular and unambiguous. Therefore parol evidence will not be admitted for the purpose of varying the contract of indorsement unless the same is irregular and ambiguous. *Martin v. Cole*, 104 U. S., 30; *Lewis v. Dunlap*, 72 Mo., 174; *Lee v. Pile*, 37 Ind., 137; *Charles v. Dennis*, 42 Wis., 56; *Fassen v. Hubbard*, 55 N. Y., 465; *Chaddock v. Vaness*, 35 N. J. L., 517. While this is the weight of authority in the United States, some of the states have held to the contrary. In Pennsylvania it was expressly held that parol evidence was admissible to control or vary the effect of the contract implied by law from an indorsement in blank, on the broad ground that the rule excluding such evidence applied only to express agreements; holding that the contract of indorsement is one implied by the law from the blank indorse-

of the notes. That he is still wholly and notoriously insolvent, having no property subject to execution, and that an action against him would be unavailing, wherefore, etc.

The second count alleges, that the defendant, professing to be the holder of the ten promissory notes (described in the first count), secured by the mortgage on, etc., for value received, sold the said ten promissory notes to the plaintiff, by

ment. *Ross v. Espy*, 66 Pa. St., 481; 5 Am. R., 394; 2 Parsons B. & N., 519.

The ground of these decisions is that a blank indorsement not filled out is not a written instrument and hence not entitled to its immunities, and not subjected to its restraints. And hence these decisions hold, that a blank indorsement may be orally proved to have been merely for the purpose of collection or as a renewal of a previous note. *Harrison v. McKin*, 18 Iowa, 485; *Miner v. Robinson*, 12 Am. D., 694.

While it is the general rule that regular indorsements may not be varied by parol evidence, there are three apparent exceptions: (1) where there is a want or failure of consideration; (2) where the indorsee is a trustee; and (3) in the case of fraud. *Daniel on Negot. Inst.*, Sec. 720; *Hudson v. Wolcott*, 39 Ohio St., 618; *Abrahams v. Mitchell*, 112 Pa. St., 232; *Smith v. Carter*, 25 Wis., 283; *Kirkham v. Boston*, 67 Ill., 599; *Lewis v. Dunlap*, 72 Mo., 178.

In the case of *Dye v. Scott*, *Gilmore*, C. J., in speaking of the right to show by parol evidence a waiver of demand and notice of non-payment, said, "As between the indorser and indorsee we regard the blank indorsement as only *prima facie* evidence of a contract which the law presumes to arise therefrom if there was a contemporaneous agreement between the parties upon which the indorsement was made, both reason and justice require that as between themselves, the actual and not the presumed contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. 35 Ohio St., 194; *Lewis v. Long*, 102 N. C., 206; *Dan. on Negot. Inst.*, Sec. 1093; *Parsons on Notes and Bills*, 584; *Farwell v. Ensign*, 66 Mich., 600; *Kulenkamp v. Groff*, 71 Mich., 675.

A different rule, however, has been laid down in several jurisdictions. There are decisions which hold that parol evidence showing that the indorsement was merely made to transfer the title is admissible, and amounts to an indorsement without recourse, where the paper is held by the indorsee, and has not been put in circulation. *Rodney v. Wilson*, 67 Mo., 123; *Light v. Kingsbury*, 50 Mo., 331; *Charles v. Denis*, 42 Wis., 56; *Kern v. Von Phul*, 7 Minn., 74; *Campbell v. Robbins*, 29 Ind., 271; *Davis v. Breron*, 94 U. S., 423; *Breneman v. Furness*, 90 Pa. St., 186.

indorsement *on the mortgage* (as in the first count); and that before the said assignment, the defendant received full payment and satisfaction of the first of said series of promissory notes, to-wit: the one payable on November 6, 1853, and all interest thereon, from the said Bodle, which interest at the time of the assignment amounted to \$30, making, of principal and interest on the note, at the time of the assignment, \$140, which the defendant refuses to pay.

The third count alleges, that "the defendant professing to be the holder of the ten promissory notes and mortgage, and that the payment of the notes was secured by the mortgage, induced the plaintiff to purchase the same for a valuable consideration, fully equal to the principal sum mentioned in the notes and interest accrued thereon; and thereupon the defendant, in pursuance of said sale, by an instrument in writing indorsed *on the said mortgage*, assigned the notes and mortgage to the plaintiff. That at the same time the de-

Indorsement—Presumption as to the Time Of.—Where an indorsement appears upon a commercial contract, without date, there is a presumption of law that it was indorsed on the day of its date, or at least before maturity. This presumption, however, may be rebutted by evidence showing when it was made in fact. *Smith v. Nevlin*, 89 Ill., 193; *White v. Weaver*, 41 Ill., 409; *McDowell v. Goldsmith*, 6 Md., 319; *Rogers v. Wiley*, 14 Ill., 65; *Ranger v. Cary*, 1 Metc., 369.

And, if the defendant alleges that it was indorsed after it became due, the burden of proof is on him to show it. *Hutchins v. Flintge*, 2 Tex., 473; *Jordon v. Downs*, 9 Rob., 265.

Every indorsement is presumed to be *bona fide*, and the burden of proof to the contrary is on the party denying the good faith of the transaction. *Woodworth v. Huntoon*, 40 Ill., 131.

If the indorsee secures the contract before maturity and without notice, he holds such contract free of any equitable defenses which may have existed against it in the hands of prior holders, and the burden is upon the defendant to show that the indorsee had notice of equities between the original parties to the note, or of such circumstances as would lead to notice at the time of the indorsing. The indorsee, before maturity, takes the title of the indorser. If he is a *bona fide* purchaser without notice he may even take a better title than the indorser, in which case he might be able to recover even though the indorser could not. And inasmuch as an indorser takes the title of the indorser, he may be able to recover even though he has knowledge of existing equities, providing the indorser was able to recover against existing equities.

fendant, by an instrument in writing, executed contemporaneously with the assignment, covenanted and agreed with the plaintiff that the notes were secured by mortgage. And in consideration that the plaintiff would receive the notes without indorsement, the defendant then and there agreed by parol, and undertook and promised the plaintiff, that if he could not collect the same from Bodle, the defendant would pay the plaintiff the sum of money mentioned in the notes. The foreclosure of the mortgage; the insufficiency of the mortgaged premises to pay the debt; the insolvency of Bodle, and that the note due November 6, 1858, with the interest thereon, remains due and unpaid, are averred, substantially, as in the first count.

Decision.—The first count is evidently based upon the supposition that the defendant is liable as an indorser of the notes. This, however, is not the case. In order to render him thus liable, the indorsement of the notes must have been made “thereon” (1 R. S., 1852, p. 378), or perhaps, “on another paper annexed thereto (called in French, *Allonge*),

The reason for this rule is that when the contract once comes into the hands of a *bona fide* holder without notice it is purged of all equities existing against it, and they may not be interposed again against one having notice even. The only limitation on this rule is that when it reaches the hands of the *original* parties again, the equities attach and may be interposed against them. *Kost v. Bender*, 25 Mich., 515; *Woodworth v. Huntoon*, 40 Ill., 141, where Walker, C. J., said, “A note tainted with fraud or other infirmity passing into the hands of an innocent purchaser, not chargeable with notice, for a valuable consideration (and before maturity), he acquires it purged of the defenses, and any other person acquiring it from him succeeds to his rights in the same condition he held them. A defense to the instrument in the hands of an original holder having been thus cut off is not revived by the note being again transferred.” Judge Cooley, in discussing this question in the case of *Kost v. Bender*, *supra*, says, “But I am not aware that this rule has ever been applied to a purchaser by the original payee, nor can I perceive that it is essential to the protection of the innocent indorsee that it should be.”

Indorsement—Presumption as to the Place.—Every indorsement is presumed to have been made, at the place where the instrument is dated. This presumption is but *prima facie*. *Brook, Oliphant & Co. v. Vannest*, 58 N. J. L., 162; *Maxwell v. Vansant*, 56 Ill., 58.

which is sometimes necessary, when there are many successive indorsements to be made."¹

The *indorsement* in question, made upon the mortgage, refers to the notes as being therein described, and *is not upon the notes, or upon any paper attached to them*. Such an assignment could not operate to transfer the *legal title* to the notes. It would convey an *equitable title*, authorizing the *assignee*, under our code, to sue thereon in his own name, but it does not place the assignor in the condition of a *legal indorser*. By such an assignment, the assignor does not warrant the solvency of the maker of the notes. It is no more effectual for that purpose than a parol assignment would be, an assignment made by the delivery of the notes. The case is analogous to the transfer of a bill payable to bearer, by delivery. "If it is payable to the bearer, then it may be transferred by mere delivery. But, although it may be thus transferred by mere delivery, there is nothing in the law which prevents the payee of a bill, payable to himself or bearer, from transferring it, if he chooses, by indorsement. In such a case, he will incur the ordinary liability of an indorser, from which, in the case of a mere transfer by delivery, he is ordinarily exempt. On the transfer of a bill, payable to the bearer, by delivery only, without indorsement, the person making the transfer to be deemed a party to the bill; although he may in some cases incur a limited responsibility to the person to whom he immediately transfers it, founded upon particular circumstances, as, for example, upon his express or implied guaranty of its genuineness, and his title thereto."²

The defendant not being liable upon the notes, as indorser thereof it follows, that the first count is bad, and the demurrer thereto was properly sustained.

The second count we also deem defective. Admitting that the defendant impliedly warranted that the note thus transferred had not been paid to him, which would seem to be

¹Story on Bills, § 204. See also *Rex v. Bigg*, 1 Strange, 18; *Arnot v. Symonds*, 85 Pa. St., 99; *Moxon v. Pulling*, 4 Camp., 50; *Young v. Glover*, 3 Jurist. (N. S.), 637; *Badgley v. Votrain*, 68 Ill., 25.

²Story on Bills, § 200.

the case, still he is not liable on the contract of assignment. The plaintiff could only sue to recover what he paid for the assignment of the note, as for money paid upon a consideration that had failed. If property was given for the assignment, then he could only sue for the property, as for property sold and delivered; and if the assignment was for a prior debt, then the prior debt only could be sued for.¹

Here, *the consideration paid for the assignment*, and to be recovered, if any thing, *is not set out*. Nothing more is averred in this respect than that the assignment was made "for value received." In what the value was received, whether in money, and if so, how much, or property, or by way of satisfaction of a precedent debt, does not appear. There is, evidently, not enough stated to show what the plaintiff paid, and, therefore not enough to show what he was entitled to recover.

The instrument in writing therein mentioned, executed contemporaneously with the assignment, by which, as is alleged, the defendant agreed that the notes were secured by mortgage, is not set out, and therefore the case stands as if the allegations in that respect were stricken out. The parol agreement made, as is alleged, contemporaneously with the written assignment, can not be admitted to vary or extend the effect of the assignment as written. The doctrine in this respect is stated in the case of *McClure v. Jeffrey*,² as follows: "The rule is, that all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it, and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves."

The demurrers, we think, were correctly sustained, and the judgment must be affirmed.

The judgment is affirmed, with costs.³

¹ Story on Prom. Notes, §§ 117, 118 and notes.

² 8 Ind., 79.

³ Upon the question, as to what constitutes an indorsement, the following authorities will be found to throw some light; 2 Bl. Com., 468, 469; Story on Notes, § 121; 1 Stranges R., 18, 19; Rex v. Bigg, 3 Peere William's R., 419; 11 Grattan's R., 830.

SECTION 43.

AN INDORSEMENT CAN ONLY BE MADE BY THE PAYEE OR SUBSEQUENT HOLDER. AN INDORSEMENT BY A STRANGER TO THE BILL OR NOTE IS IRREGULAR OR ANOMALOUS.

UNION BANK *v.* WILLIS.¹

IN THE SUPREME COURT OF MASSACHUSETTS, OCTOBER, 1844.

[*Reported in 8 Metcalf, 504.*]

The Form of Action.—Assumpsit by the indorsees against the indorser of a promissory note of the following tenor:

“ August 8th, 1843.

“ For value received, I promise Tilley Willis, to pay to him, or order, \$350, in four months from date.

T. D. Thompson.”

On the back was the name of “ B. L. Mirick & Co.,” and under that name was the name of the defendant, both indorsements being in blank.

At the trial before the chief justice, the plaintiff's cashier testified that they discounted the note for Thompson, and that when it was discounted, the names stood on the note as they now do. There was no evidence that the note was presented to Mirick & Co. for payment; but there was evidence tending show that notice of dishonor was given to them, as indorsers, as well as to the defendant.

The defendant contended that Mirick & Co. were to be considered as joint, or joint and several, promisors, and that the defendant was not responsible as indorser, without proof of presentment to them for payment. But it was ruled that they were not to be so considered as promisors, as that pre-

¹ This case is cited in Daniel on Negotiable Instruments, 455, 594, 713, 713a, 999a, 1757; Benjamin's Chalmers on Bills, Notes and Checks, 169, 221; Bigelow on Bills and Notes, 34, 104, 105; Bigelow's Cases on Bills and Notes, 38; Norton on Bills and Notes, 137; Tiedeman on Commercial Paper, 157, 212, 270, 313, 336.

sentment of the note to them, and demand of payment of them, were necessary to charge the defendant. A verdict was returned for the plaintiffs, which is to be set aside, and a new trial granted, if the ruling was incorrect.

Decision.—It is admitted that the note was not presented for payment to Mirick & Co.; and the question is, whether the omission to do it discharges the indorser.

If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity, as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say, that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the statute of frauds; or that he should be treated, by third parties, simply as a second indorser; leaving the payee and himself to settle their respective liabilities, according to their own agreement.

But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit.

The first case of this description, of which any mention is made in the reports, is that of *Sumner v. Parsons*, tried before this court in Lincoln county, July term, 1801. The facts were these: "Parsons wrote his name on a paper and gave it to John Brown, but there was no evidence of the intent, or of any connection in business between them. Brown made a note on the other side, payable to Jesse Sumner or order, on demand, with interest, and signed it, and thirty days after made a partial payment on it. Sumner then got a writing in these words over the name of Parsons: 'In consideration of the subsisting connection between me and my son-in-law, John Brown, I promise and engage to guaranty the payment of the contents of the within note, on demand.' And he sued Parsons, declaring on the promise, specially stating it, and the note, but did not aver any demand on John Brown, or notice to Parsons. In two trials in the supreme judicial court, it

was held that Parsons was liable, and that Sumner had a right to fill the indorsement so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, warrantor or surety, liable in the first instance, and in all events, as a joint and several promisor would be."¹ Mr. Dane, who cites it in his Abridgment,² remarks, that "this case was carried as far as any case had gone, and on the review the court was not unanimous; and it has since been questioned"; and we have no doubt with good reason; for the holder of the paper, having himself set out the contract by the words written over the name of the defendant, should have been held by its terms, and the legal effect should have been given to the material word "guaranty." And in that view of the contract, the promise of Parsons was only to pay after a demand upon Brown for payment, and a refusal by him, and of which Parsons should have had notice. But the court must have construed the writing as constituting him an original promisor, and so bound, absolutely, without notice. And in our apprehension, the writing of the guaranty over the name of Parsons ought not to have been as an act obligatory on him; but he should have been treated, if held at all, as an indorser of the note, and, as such, subject to the liabilities, and entitled to the notice, of an indorser.³

The next case which came before the court was that of *Josselyn v. Ames*.⁴ By the report, it appears that John Ames was indebted on a note to the plaintiff, who demanded security, and John offered his brother Oliver as surety, who was accepted. John then made a note to Oliver, not negotiable, and Oliver put his name on the back in blank. The plaintiff received it and gave up his former note, and afterwards wrote over the defendant's name the same words as in *Sumner v. Parsons*, with this additional clause, "and in consideration of receiving from Elisha Josselyn a note of the said John of the

¹ Amer. Prec. Declarations, 113.

² Vol. I, 416, 417.

³ See *Beckwith v. Angell*, 6 Conn., 325, opinion of Hosmer, C. J.

⁴ 3 Mass., 274.

same amount." The court held that the plaintiff could not recover in that action, but might cancel the words written, and substitute, "for value received, I undertake to pay the money within mentioned to Elisha Josselyn," and upon such an indorsement, might maintain an action upon the facts reported.

In what light the court held the defendant, does not distinctly appear; but we presume as an original promisor, from the manner in which the case of Sumner v. Parsons is spoken of. "The guarantor in that case," they say, "was not the promisee, but a stranger, who warranted the payment to him. He cannot himself warrant to a third person payment of a note made payable to himself and not negotiable."

The next reported case is that of Hunt v. Adams,¹ which was assumpsit on a note given by Chaplin to Bennet, under which the defendant wrote,

"I acknowledge myself holden as surety for the payment of the demand of the above note. Witness my hand.

Barnabas Adams."

This cause was much considered, and the court ruled that the defendant, Adams, was to be charged as a promisor, and that his holding himself as surety did not abridge or affect the plaintiff's rights, but only was evidence, as between the promisor and himself, that he had signed for his accommodation. Other cases between the same parties, on similar notes, afterwards arose, and were decided in the same manner.²

Immediately after, occurred the case of Carver v. Warren.³ That was on a note made by one Cobb to the plaintiff, and on the back of which the defendant wrote his name; and the plaintiff filled the indorsement, and declared upon it as his promise. The defendant demurred to the declaration, on the ground that this was but a promise to pay the debt of another, and was void for want of consideration. But the court held that, by the pleadings, each promised to pay the same

¹ 5 Mass., 358.

² 6 Mass., 519.

³ 5 Mass., 545.

sum, and that the defendant's promise did not import any guaranty or collateral stipulation; and that if the defendant had indorsed as guarantor, and the present indorsement was filled up without his consent, or any authority from him, he should have pleaded the general issue, and on the trial he might have availed himself of this evidence. And so the plaintiff had judgment on the demurrer.

The case of *Hemmenway v. Stone*, followed. There the note ran, "I promise to pay F. M. Stone or order," and was signed B. Chadwick; and below was signed by the defendant. The court held that it was a joint and several note, like the case of *March v. Ward*.¹

The next case was *White v. Howland*,² which was on a note payable by one Taber to the plaintiff, and on the back of it was written,

"For value received, we jointly and severally undertake to pay the money, within mentioned, to the said William White.

*I. Coggeshall, Jr.
Jno. H. Howland."*

The court held that this undertaking was within the principle settled in *Hunt v. Adams*, and was the same as if the party had signed his name on the face of it; and that he was well charged as a several original promisor.

The case of *Moies v. Bird*,³ which succeeded, is substantially like the present. A note was made to the plaintiff, and signed by Benjamin Bird, and the defendant signed his name in blank on the back of the note. The court say, the defendant "leaves it to the holder of the note to write anything over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as an original promisor."

¹ 7 Mass., 58.

² Peaks's Cas., 130; see also Bayley on Bills (2d Amer. ed.), 44.

³ 9 Mass., 314.

⁴ 11 Mass., 436.

In the case of *Baker v. Briggs*,¹ which was an action to recover the amount of a promissory note made by one Ryan to the plaintiff, the name of the defendant, Briggs, was written on the back of it, and the court say that, according to several decisions, it was right to declare against him as promisor, though he stood in the relation of surety to Ryan, who signed the note on the face of it.

The case of *Chaffee v. Jones*² was assumpsit on a note signed by Israel A. Jones, as principal, and Eber Jones and E. Owen & Sons, as sureties, by which they jointly and severally promised to pay the president, etc., of the Housatonic Bank, or their order; and the plaintiff put his name on the back of the note in blank. The plaintiff was called upon, after the neglect of the makers, and he paid it to the bank. The court held that where one, not a promisor, nor indorser, puts his name on a note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated, nor a title made to it, through his indorsement; nor as guarantor, there being no distinct consideration; but he means to give security and validity to the note by his credit and promise, and it is immaterial, for this purpose, on what part of the note he places his name. So in *Austin v. Boyd*,³ where the defendant's name was, in like manner, on the note, it was held that the party, by thus putting his name on the back, makes himself an original promisor. He intends by it to give credit to the note.

The case of *Samson v. Thornton*⁴ was assumpsit on a note made by Benjamin Russell to the plaintiff, and was indorsed by the defendant, Thornton; and the declaration charged him as an original promisor. The court there ruled that the defendant, not being the payee of the note, must be held to stand in the character of an original and joint promisor and surety.

¹ 8 Pick., 130.

² 19 Pick., 260.

³ 24 Pick., 64.

⁴ 3 Met., 275.

The case of *Richardson v. Lincoln*¹ is of the same type. There the court held that the defendant, not being payee, but having put his name, in blank, on the note, must be considered as an original promisor and surety, if he put it on simultaneously with the promisor, as an original contractor.²

The same questions have arisen in New York, in various cases, and have been decided in a similar manner. They will be found cited in *Story on Notes*, §§ 59, 472-480, where the subject is fully discussed, and the authorities examined.

To hold the party, however, as promisor, where the name alone is written, it must appear that he made the promise at the time when the note itself was made; otherwise, he may either not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved.³ But that the promise was made at the same time with the note, is a fact which is to be presumed when the note is in the hands of a *bona fide* holder, and nothing is shown to the contrary. And in the present case, the note was offered to the plaintiffs for discount, by the maker himself, with the names of Mirick & Co. and Willis on the back of it; showing it, therefore, to have been an original undertaking on their part.

It was contended, in the argument, that Mirick & Co. were merely sureties, and that the plaintiffs had a right to treat them as such, and therefore were not bound to demand payment of them as makers, as a necessary step to enable them to charge the indorser; the relation of promisor, surety and guarantor being distinct. There is, unquestionably, a distinction between these several undertakings; and always so in regard to a mere guarantor. But as to the subsisting relations between a principal and surety, they rarely affect the contract between the creditor and surety. A man may be equally a surety and an original promisor; as where the promise is, I, A. B., as principal, and I, C. D., as surety, promise

¹ 5 Met., 201.

² See also *Sumner v. Gay*, 4 Pick., 311.

³ *Carvor v. Warren*, 5 Mass., 545; *Tenney v. Prince*, 4 Pick., 385; *Baker v. Briggs*, 8 Pick., 130; *Oxford Bank v. Haynes*, 8 Pick., 423; *Story on Notes*, §§ 473, 474; *Beckwith v. Angell*, 6 Conn., 315.

to pay; or where the party signs, and adds to his name the word surety. This does not make him less a promisor. It only defines the relation between him and his co-promisor; and as promisor, the necessity of a presentment to him is not dispensed with, if the intention of the holder of the note is to charge the indorser. It is not for the holder of the note to choose in what character he will consider the party who has put his name on the note; but he must treat him as sustaining that legal relation which the facts establish. If he put his name on the note at the time it was made, like the case at bar, he is a promisor; if after the making of the paper, he is a surety or guarantor, according to the agreement upon which he gives his signature. The fixing of the relation of the party, when he enters into the contract, is necessary for the protection of holders, and for guarding the rights of indorsers, whose liability is conditional. If it were held otherwise, I do not well see how such contracts could be supported against the objection of being void within the statute of frauds. And, as it is, I consider these engagements rather as exceptions to the statute, than in any other light, and as growing out of, or rather engrafted upon, the law merchant applicable to regularly drawn bills of exchange and promissory notes.

Upon this view of the law, as drawn from the various cases, we consider Mirick & Co. to have been joint and several promisors with Thompson, and liable in like manner with him.

The demand, in this case, was made on Thompson, the signer of the note, and notice was given to Mirick & Co. and to Willis, as indorsers; and it is now contended, by the plaintiffs, that if it should be held that Mirick & Co. are joint and several promisors with Thompson, and not indorsers, then the demand on Thompson is, in law, a demand on them also; and such demand being proved, that the indorser, on due notice, will be bound.

The precise question here presented, we believe, has not been decided in any reported case. If the joint and several promisors are to be considered in the light of partners, then a notice to one must be esteemed a notice to all, as partners are but one person in legal contemplation; each partner,

acting in such capacity, being not only capable of performing what the whole can do, and of receiving that which belongs to all, but by such acts necessarily binding all the partners. It follows, therefore, as an incident to such joint relations, that all the partners are affected by the knowledge of one. But in respect to mere joint and several promisors on a note, there is not such absolute community of interest between them, nor such necessary connection with each other, as to constitute them partners. The relationship is confined to the present specific liability of a joint and several promise, and which can not be extended by the act of one, so that his conduct shall necessarily bind the other. As between themselves, one promisor may be a mere surety, and the other the debtor; one surety may have received security for lending his name, the other not. Or, if there are three joint and several promisors, two may be sureties, and the other the principal debtor, although the fact may not appear on the note.

As the incidents, then, of a partnership do not attach to such a limited joint liability, there being neither a community of interests, nor joint participation of profit and loss, the fact of knowledge on the part of the whole, from the actual knowledge of one, does not follow as a presumption of law; and a demand upon one is not, therefore, in law, a demand upon the whole. If, then, the bringing home of knowledge to each, or proof of a demand upon each, is a fact necessary to be proved, in order to bind third persons, then such knowledge or such demand on each, must be proved as any other fact.

A case arose in Connecticut, upon a note payable to two jointly, and by them indorsed in their individual names. One ground of defense was want of notice of non-payment; and notice was proved to have been given to one only. The court held, after a careful consideration of the case, that a notice to one laid no foundation for an action against both, as each payee must indorse it, in order to transfer the title.¹ This case, we think, involves and settles a principle similar to the one arising in the case at bar. And the Supreme Court of the state of New York strongly incline to a like view of the

¹ *Shepard v. Hawley*, 1 Conn., 367.

law, in a case¹ where it was not necessary to decide the point. And Judge Story, who carefully considers the subject, in his work on notes, is of the same opinion.²

To apply the law to the facts as proved in the case before us: Thompson and Mirick & Co. stand in the relation of joint

¹ 5 Hill, 234.

² Story on Notes, §§ 230, 255.

Indorsement by Joint Payees.—If a commercial contract be made payable to several persons, not partners, or in case it be indorsed to several persons jointly, it can only be transferred, by indorsement, by a joint indorsement of them all. If, however, the joint payees are partners, then it may be transferred by any one of them. One of the joint payees may be authorized by the others to indorse for them. *Ryhiner v. Feickert*, 92 Ill., 305; Story on Promissory Notes, sec. 125; Dan. on Negot. Inst., sec. 701a.

While a joint payee or indorsee may not transfer the title, legal or equitable, by his separate indorsement, he may, however, transfer his interest in the same; *Ryhiner v. Feickert*, supra; Dan. on Negot. Inst., supra; in which case the transferee would take an equitable title only in the instrument. When joint payees become joint indorsers, the right of contribution exists among them. *Lane v. Stacy*, 8 Allen (Mass.), 41 (1864).

By Whom May the Indorsement be Made?—In case the contract can be transferred by indorsement, the general rule is that it may always be indorsed by the legal or lawful holder. It may also be indorsed by an infant or a person of unsound mind. When the indorsement is by an infant it will pass a good title to the paper; but the infant of course does not render himself liable thereon unless he desires so to be, or unless after reaching his majority he ratifies the contract. But the infant may indeed avoid his indorsement and intercept the payment to the indorsee, or by giving notice to the antecedent parties, of his avoidance, furnish to them a valid defense against the claim of the indorsee. But until he does so avoid it, the indorsement is to be deemed, in respect to such antecedent parties, as a good and valid transfer. *Culver v. Leavy*, 19 La. Ann., 202; Story on Bills and Notes, sec. 80; Daniel on Negot. Inst., sec. 228; Tied. on Com. Paper, sec. 49.

The indorsement by an infant is voidable only and not void. *Goodsell v. Meyers*, 3 Wend., 479.

It has been said that, where he receives full consideration for the transfer, his right to avoid his contract is suspended until he reaches his majority; and that he cannot disaffirm it then without returning or offering to return the consideration received. There is some doubt, however, about this being the rule. *Medbury v. Watrous*, 7 Hill, 110; Dan. on Negot. Inst., sec. 229.

and several promisors. Payment of the note was demanded of Thompson, but not of Mirick & Co. The defendant is an indorser, liable only upon legal notice of a demand upon the promisors and a refusal by them to pay the note; and we are

In case of the death of the holder, the right in these contracts passes to his personal representatives—administrators or executors—and then must be indorsed by them. The personal representative cannot bind the estate which he represents by his indorsement. *Curtis v. National Bank*, 39 Ohio St., 579. Where there are several executors they must all indorse. *Brown v. Salisbury*, 1 Glyn. & Jam., 407; *Tiedeman on Commercial Paper*, 262.

At common law the husband by reducing the wife's chose in action to possession became the lawful owner of them and must therefore transfer them by indorsement. *Conner v. Martin*, 1 Strange, 516; *Miller v. Delameter*, 12 Wend., 433.

This rule has now been greatly modified in many of the states by statute, so that she now owns and controls her own estate just as though she were a *feme soule*.

Aspendthrift or a person under guardianship can not contract, and therefore cannot pass title by an indorsement. *Lynch v. Dodge*, 130 Mass., 458.

In case of bankruptcy all the property of the bankrupt passes to the assignee, and together with it the control, etc., and thereby the original holder loses the right to indorse. In such cases the assignee may indorse these contracts.

Where these commercial contracts are made payable to a co-partnerships, any one of the firm may indorse it; but such indorsement must be in behalf of the partnership. Otherwise the member of the firm who indorses would be personally bound. If one of the firm dies, then the survivor may indorse in his own name. If the paper is payable to a corporation it must be indorsed by some agent of the corporation who has authority to bind the corporation by contract, and then the indorsement must show that it is the act of the corporation, for otherwise the agent would be personally bound. When a bill or note or other commercial contract is payable to two or more persons jointly and who are not partners, they must all join in the indorsement in order that the whole title may be passed. If one of them indorses alone, it passes his equitable interest only. The indorsee in this case could not maintain an action on the paper. When, however, the paper is payable to either of two or more persons, then any one may pass the title by indorsement. *Culver v. Leavy*, 19 La. Ann., 202; *Ryhiner v. Feickert*, 92 Ill., 311.

Of course one of joint parties may be authorized to indorse such contract. He may also indorse to the others, in which case the indorsement will carry with it all his interest. *Russell v. Swan*, 16 Mass., 314.

of opinion that he has a right to avail himself of this neglect to make demand on Mirick & Co. to discharge himself from his liability as indorser.

Verdict set aside, and a new trial granted.

Irregular or Anomalous Indorsement—Defined.—An irregular or anomalous indorsement is where a person who is not the payee, but a third party, places his name on the back of a commercial contract before the name of the payee or of the original party to the contract. It is the indorsement by a stranger before the delivery of a commercial contract. Where the payee of a commercial contract indorses it by placing his name on the back of the instrument, a contract of indorsement is created; and parol evidence is not admissible to change or vary the terms of his contract. *Kingsland v. Koeppe*, 137 Ill., 344; 28 N. E. R., 48; *Good v. Martin*, 95 U. S., 95; *Blakeslee v. Hewitt*, 76 Wis., 341 (44 N. W. Rep., 1105); *Cady v. Shepherd*, 12 Wis., 639; *People's Bk. v. Jefferson, etc. Bk.*, 106 Ala., 624. The exact nature of the liability of one who, not being the payee,—a stranger,—writes his name across the back of a negotiable contract before delivery, is differently stated in the various jurisdictions. In some states he is held to be a *guarantor*; in some a *joint maker*; in others an *indorser*; in others as a *co-surety*; but in all of the states it is held that parol evidence may be admitted for the purpose of showing the intention of such signer at the making of such signature. In Indiana it is held that he is a co-security or joint maker if the contract is non-negotiable while if it is a negotiable contract the same act is held to be an indorsement and the party liable as an indorser. Some of the states have settled the nature of his liability by statute. In Connecticut, New Jersey, Indiana, Wisconsin, Pennsylvania, New York, Maine and in the courts of the United States his liability is that of an indorser. *Spencer v. Allerton*, 60 Conn., 410; *DePauw v. Bank*, 126 Ind., 553; *Chaddock v. Vaness*, 35 N. J. L., 517; *Cady v. Shepherd*, 12 Wis., 639; *Smith v. Kessler*, 44 Pa. St., 142; *Lester v. Paine*, 39 Barb., 616; *Brown v. Butler*, 99 Mass., 179; *Sturtevant v. Randall*, 53 Me., 149; *Good v. Martin*, 95 U. S., 95. He is held to be a grantor in Illinois, Kansas, California, and Nevada. *Kingsland v. Koeppe*, 137 Ill., 344; *Fullerton v. Hill*, 48 Kan., 558; *Riggs v. Waldo*; 2 Cal., 485. He is held to be a joint maker or co-security in Tennessee, Missouri, Maryland and Vermont, Michigan, Massachusetts, Maine, Colorado, Arkansas, Delaware, Minnesota, Missouri, Ohio, Rhode Island, North Carolina, South Carolina, Texas, Maryland, New Hampshire, Vermont, Utah. *Bank of Jamaica v. Jefferson*, 92 Tenn., 537; *First Nat. Bk. v. Payne*, 111 Mo., 291; *Owings v. Baker*, 54 Md., 82; *Smith v. Long*, 40 Mich., 555; *Seymour v. Mickey*, 15 Ohio St., 515.

SECTION 44.

NO PARTICULAR FORM IS REQUIRED FOR AN INDORSEMENT. IT IS SUFFICIENT IF IT IS MADE, EITHER WITH AN INTENTION TO TRANSFER THE CONTRACT UPON WHICH IT IS WRITTEN, OR TO STRENGTHEN THE SECURITY AND TO TRANSFER THE CONTRACT.*

BROWN v. BUTCHER'S, ETC., BANK.¹

IN THE SUPREME COURT, NEW YORK, MAY, 1844.

[Reported in 6 Hill, 443, 41 Am. Dec., 755.]

On error from the Superior Court of the city of New York, where the Butchers and Drovers' Bank sued Brown as the indorser of a bill of exchange, and recovered judgment. The indorsement was made with a lead pencil, and in figures thus, "1. 2. 8.," no name being written. Evidence was given strongly tending to show that the figures were in Brown's hand-writing, and that he meant they should bind him as in-

¹This case is cited in Daniel on Negotiable Instruments, 74, 688a; Benjamin's Chalmers on Bills, Notes and Checks, 57; Norton on Bills and Notes, 58, 108, 382; Tiedeman on Commercial Paper, 12, 265; Bigelow on Bills and Notes, 10, 25, 63; Bigelow's Cases on Bills and Notes, 77. See also 41 Am. Dec., 755, and cases cited.

***Form of Indorsement.**—No particular form is required so long as it is in writing and placed upon the contract to be transferred. It is quite immaterial whether the indorsement be written on the back of the instrument or on the face. Young v. Glover, 3 Jurist (U. S.), 637; 1 Aures Cases on Bills and Notes, 228; Gorman v. Ketchum, 33 Wis., 427; Chitty on Bills, 227; Haines v. Dubois, 30 N. J. L., 259; Rex v. Bigg, 1 Strange, 18; Shaw v. Sullivan, 106 Cal., 208; Quin v. Sterne, 26 Ga., 223; Arnot v. Symonds, 85 Pa. St., 99; Marion Gravel Road Co. v. Kessinger, 66 Ind., 553; Herring v. Woodhull, 29 Ill., 92; Yarborough v. Bank of England, 16 East, 12; Gibson v. Powell, 6 How. (Miss.), 60; Moies v. Bird, 11 Mass., 436; Story on Promissory Notes, sec. 121.

The indorsement is generally written upon the back of the note and at the left-hand end thereof. In the case of Haines v. Dubois, *supra*, the payee wrote his name under that of the maker, and it was held to be a sufficient indorsement.

dorser; though it also appeared that he could write. The court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown thereupon brought error.

An Allonge Defined.—The indorsement may also be written upon another paper if the same is attached to the contract, in which case it is called an "allonge." It may sometimes happen that in numerous transfers from hand to hand, the back of the paper is covered by endorsements. In such case the holder may tack on a piece of paper sufficient to bear his own and subsequent indorsements. This addition is called an "allonge." *Young v. Glover*, 3 Jurist (U. S.), 637; *French v. Turner*, 15 Ind., 59; *Cusley v. Roub*, 16 Wis., 616; *Folger v. Chase*, 18 Pick (Mass.), 63; *Helmer v. Com. Bank*, 44 N. W. Rep., 482.

The full name of the indorser should be written, and it is usual so to do; but the initials will be sufficient, as well as any mark or sign, instead of the name if made to represent it. *Merchants Bank v. Spicer*, 6 Wend., 443; *Corgan v. Trew*, 39 Ill., 31; *Rogers v. Colt*, 6 Hill, 322; *Brown v. Butchers and Drovers Bank*, 6 Hill 322; *Johnson's Cases on Bills and Notes*, 114.

The indorsement may be made with pen or pencil, so long as the intention of the parties can be ascertained. *Geary v. Physic*, 5 Barn. & C., 234; *Brown v. Butchers Bank*, 6 Hill, 443; *Closson v. Steans*, 4 Vt., 11; 41 Am. Dec., 755.

The following forms of expression have been held to constitute good indorsements when written across the instrument and properly signed:—

"1, 2, 8;" "Pay the contents to A;" "Pay A;" "Pay A or order;" "Pay A or bearer;" "assign;" "sell and assign;" "Pay to the order of A;" "A;" "Pay A only;" "Pay A for the use of B;" "I hereby assign this draft and all benefit of the money secured thereby to B;" "I hereby assign all my right and title to the within note to B." *Brown v. Butchers Bank*, 6 Hill, 443; *Adams v. Blethen*, 66 Me., 19; *Sears v. Lantz*, 47 Ia., 658; *Vincent v. Horlock*, 1 Camp., 442; *Sands v. Wood*, 21 Iowa, 263; *Shelby v. Judd*, 24 Kan., 166.

"I hereby transfer my right and title to the within note to S. A. Yeoman," was held to be a good transfer of the contract in Michigan by assignment. *Aniba v. Yeoman*, 39 Mich., 171.

The full name of the indorser should be given, but the initials will answer. No particular form is necessary. The following have also been held to constitute an indorsement: Just the name written across the back of note or bill; "Pay A. or order," or "bearer;"

Decision.—It has been expressly decided that an indorsement written in pencil is sufficient;¹ and also that it may be made by a mark.² In a recent case it was held that a mark was a good signing within the statute of frauds; and the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference.³

These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.⁴

Judgment affirmed.

SECTION 45.

AN INDORSEMENT IS NOT COMPLETE UNTIL A DELIVERY OF THE CONTRACT UPON WHICH IT IS MADE.

BROMAGE ET AL. v. LLOYD ET AL.⁵

IN THE COURT OF EXCHEQUER, MAY, 1847.

[*Reported in 1 Exchequer Rep., 32.*]

The Form of Action.—Assumpsit. The declaration

“assign;” “sell and assign;” any form of words, with the signature, which will indicate the intention of the indorser. It has been held that the indorsement need not be on the back of the instrument. *Rex v. Bigg*, 1 Strange, 18. It matters not where the signature appears, so long as it shows what the nature of the liability is. *Quin v. Sterne*, 26 Ga., 223; *Arnot v. Symonds*, 85 Pa. St., 99.

¹ *Geary v. Physic*, 5 Barn. & Cress., 234.

² *George v. Surrey*, 1 Mood. & Malk., 516.

³ *Baker v. Dening*, 8 Adol. & Ellis, 94; and see *Harrison v. Harrison*, 8 Ves., 186; *Addy v. Grix*, id., 504.

⁴ See *Rogers v. Coit*, (ante. p. 322, 323).

⁵ This case is cited in *Daniel on Negotiable Contracts*, 64, 267; *Norton on Bills and Notes*, 72, 135; *Tiedeman on Commercial Paper*, 34, 148; *Benjamin's Chalmers on Bills, Notes and Checks*, 59, 61; *Wood's Byles on Bills and Notes*, 115, 285; *Ames on Bills and Notes*, 289. See also, *Clark v. Sigourney*, 17 Conn., 511; *Clark v. Boyd*, 2 Ohio, 56; *Taylor v. Surget*, 21 N. Y., 116; *Mars-ton v. Allen*, 8 Mees. & W., 494; *Spencer v. Carstarphen*, 15 Colo., 445 (1890); 24 Pac. Rep., 882; *Laird v. Davidson*, 124 Ind., 412; *Cooper v. Nock*, 27 Ill., 301.

stated, that the defendants, on, etc., made their promissory note in writing, and thereby jointly and severally promised to pay one H. Lloyd Harries (since deceased) or order, £300 on demand, and then delivered the said note to the said H. Lloyd Harries, who then indorsed the said promissory note, but without making any delivery thereof: and afterwards, to wit, on, etc., the said H. Lloyd Harries died, having first made his last will and testament, in writing, duly executed and attested as by law required, and thereby appointed his then wife, to wit, one Jane Harries, executrix thereof, who, after the death of the said H. Lloyd Harries, to wit, on, etc., duly proved the said will and took upon herself the execution thereof, and became and was sole executrix thereof; and she, as such executrix, afterwards, to wit, on, etc., for good and valid consideration to her, as such executrix as aforesaid, in that behalf, transferred the said note, so indorsed as aforesaid, to the plaintiffs, to wit, by delivery thereof to them by her as such executrix as aforesaid; of all which the defendants then had notice, and then, in consideration of the premises, promised to pay the amount of the same note to the plaintiffs, according to the tenor and effect thereof, and of the said indorsement and delivery.

General demurrer, and joinder.

The Claim of Defendant.—The plaintiffs have no title to sue on the note. An indorsement consists of two things, namely, (1) the writing on the note of the name of the party transferring it, and (2) of a delivery for the purpose of completing such transfer.¹

In the present case, the testator wrote his name on the note, but did not deliver it; the executrix has delivered the note without indorsing it. The indorsement by the testator was a mere inchoate act which could not be rendered complete by the subsequent delivery of the executrix. In *Rex v. Lambton*,² Wood, B., says, “It is clear that a special indorsement does not transfer the property in bills until they are delivered over.” Suppose the testator has sealed a

¹ *Marston v. Allen*, 8 M. & W., 494.

² 5 Price, 442.

bond, and died without delivering it, a delivery by his executrix would not render it the deed of the testator. In *Adams v. Jones*,¹ Ld. Denman, C. J., says, "A bill may be indorsed to a party in two ways, either by special indorsement, making it payable to that party, or by a blank indorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party *as indorsee*, in order to constitute an indorsement to him." An indorsement of a bill by an executor, with delivery, will not bind the assets of the testator.² A fortiori delivery, without indorsement, cannot do so.

The Claim of Plaintiff.—First, upon general demurrer, there is a sufficient allegation of the transfer of the note. The declaration alleges that the executrix, for good and valid consideration to her as executrix, transferred the note so indorsed as the plaintiffs, to wit, by delivery thereof to them by her, as such executrix as aforesaid. That allegation is tantamount to a legal indorsement by the executrix. The promise alleged in the declaration is to pay according to the tenor and effect of the *said indorsement*. If a legal transfer can only be made by the party writing his name upon and delivering the note, then upon general demurrer, such must be taken to be the meaning of the word "transferred." The true construction of the declaration in this: that the executrix transferred the note "being so indorsed as aforesaid;" that is, indorsed by another person. The *videlicet* does not control the operation of the word "transfer," or render material the mode in which it is alleged to have been made.³ A "transfer" may mean either an indorsement or assignment; which latter word is used in the statute 3 & 4 Anne, c. 9. If the defendant had pleaded by denying the transfer modo et formâ, and that issue had been found against him, he could not after verdict have taken advantage of any ambiguity in the declaration.

Secondly, even if it be taken on the face of the declaration that there was a mere writing of his name by the testator,

¹ 12 Adolph. & E., 459.

² Childs v. Monins, 2 Brod. & Bing., 460; E. C. L. R., 6.

³ Hammond v. Colls, 1 C. B., 916.

and a delivery by the executrix, such transfer would pass the property in the note, and entitle the plaintiffs to sue upon it. Where the testator has delivered a note without indorsement, an indorsement by his executor is equally valid as if made by himself.¹ That case only decides, that where a party delivers a note for a valuable consideration, without indorsement, he creates an equitable, not a legal title, and the holder, having an equitable right, is entitled to call on the executor of the party who delivered it to give a formal transfer. If a note is transferred without indorsement before bankruptcy, the holder may call on the bankrupt or his assignees to indorse it.² There are many instances in which an executor may adopt and ratify the acts of his testator. A cognizance by a defendant, as bailiff of an executor, for rent due to the testator, is supposed by proof of a distress by him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor.³ In that case Ld. Denman, C. J., said, "The law knows no interval between the testator's death and the vesting of the right in his representative." An executor is not in the situation of a mere agent, but his acts are identified with those of his testator.

Decision.—This is an action on a promissory note, upon which a party has written his name, and after his death his executrix delivers the note to the plaintiffs without indorsing it; so that there is a writing of his name by the deceased, and a delivery by his executrix. Those acts will not constitute an indorsement of the note; the person to whom it is so delivered has no right to sue upon it.

The promissory note was made payable to the testator "*or order*;" that means order in writing. The testator has written his name upon the note, but has given no order; the

¹ Watkins v. Maule, 2 Jac. & W., 237.

² Smith v. Pickering, Peake, N. P. C., 50; Arden v. Watkins, East., 317.

³ Whitehead v. Taylor, 10 Adol. & E., 210.

executrix has given an order, but not in writing. The two acts being bad, do not constitute one good act.

The word "transfer" means indorsement and delivery.

Judgment for the defendant.*

SECTION 46.

AN INDORSER CONTRACTS TO PAY THE BILL OR NOTE INDORSED ACCORDING TO ITS TENOR, IF, UPON PRESENTMENT TO AND DEMAND UPON (AND PROTEST WHEN NECESSARY), THE PARTIES WHO ARE PRIMARILY LIABLE, PAYMENT IS REFUSED, HE IS DULY NOTIFIED OF SUCH REFUSAL.

HOTEL CO. v. BAILEY.¹

IN THE SUPREME COURT OF VERMONT, MAR., 1892.

[*Reported in 64 Vermont, 151; 24 Atl. Rep., 136.*]

The Form of Action.—Special assumpsit for the annual interest due on five promissory notes indorsed by the defend-

* An acceptance or indorsement of a bill or note is not complete without actual or constructive delivery; *Cox v. Troy*, 5 B. & Ald., 474; *Brind v. Hampshire*, 1 M. & W. 65; *Marston v. Allen*, 8 Id., 494; *Belcher v. Campbell*, 8 Q. B., 1. And as between the original parties and subsequent holders with notice, evidence that the delivery was merely for safe keeping, will, it seems, sustain a traverse of the indorsement, *Marston v. Allen*, supra; although not as against a subsequent *bona fide* purchaser, *Hayes v. Caulfield*, 5 Q. B., 81.

¹ This case is cited in illustrative cases on Bills and Notes, 109. See also *Allin v. Williams*, 97 Cal., 403; 32 Pac., 441; *First Nat. Bank v. Crabtree*, 86 Iowa, 731; 52 N. W., 559; *Bowman v. Hiller*, 130 Mass., 153; *Kenworthy v. Sawyer*, 125 Mass., 28; *Sinker v. Fletcher*, 61 Ind., 276; *First Nat. Bank v. National Marine Bank*, 20 Minn., 63 (Gil., 49). The indorser impliedly warrants that the paper is a valid obligation in every particular. that all the parties to said note were competent to contract; that he has a perfect title to the paper; that the maker will pay it if properly presented (*Copp v. McDugall*, 9 Mass., 1; *Erwin v. Downs*, 15 N. Y., 575; *Prescott Bank v. Caverly*, 7 Gray, 217); that the note is not usurious (*Hazard v. Bank*, 72 Ind., 130; *Stewart v. Bramhall*, 74 N. Y., 85.)

To charge an indorser there must be a demand and notice. 1 Par., Bills and Notes, 353-356, 442, 443; Sto. Pr. Notes, s 135; 2 Aik., 264; *Whitney v. Dean*, 22 Vt., 561.

ant. Plea, the general issue. Judgment for the defendant. The plaintiff excepts.

Decision.—It appears by the statement of facts that Geo. Doolittle and Mrs. E. J. Doolittle promised to pay the defendant, William P. Bailey, or order, five thousand dollars, as their five promissory notes should respectively become due, and the interest thereon *annually*. The notes are dated April 1, 1886, are for \$1,000 each, and payable 16, 17, 18, 19 and 20 years from their date.

The plaintiff, as the indorsee of the notes, seeks to recover of the defendant, as indorser, the first three years' interest upon them without demand of the makers and notice to the defendant of the makers' default of payment.

The defendant's counsel contended,—1st, that the indorser cannot in any event be compelled to pay the interest as it annually falls due, that his conditional liability does not become absolute until the notes respectively mature, and then only after demand and notice.

2d. That if the interest is collectable of the indorser as it annually accrues it is after the usual measures have been taken to make him chargeable.

The general rule of law relative to the respective liabilities of the maker and indorser of a promissory note is well defined. *The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is conditional that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder.*

It seems clear that the indorser is not liable for the annual payment of the interest without performance of these conditions by the holder. If he were thus liable his relation to the note would be like that of a surety or a joint maker, and his promise, instead of being *conditional*, would be *absolute* as to the payment of the interest. This is contrary to the general statement of the law that his liability is conditional. The relation of principal does not exist between him and the maker. They are not co-principals. Their contracts are

separate and they must be sued separately, at common law.¹

The maker has received the money of the payee and in consideration thereof promises (absolutely) to repay it according to the terms of the note, and if he fails to pay, his contract is broken and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon demand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal.

Interest Payable Annually.—When due.—It is held that though the annual interest (interest payable annually) upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal so that the recovery of it is barred by the statute of limitations until the recovery of the principal is thus barred.² The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest, and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal.³ *But it is so far an independent debt that he may maintain an action against the makers for it as it annually accrues, or allow it to accumulate and remain as a part of the debt until the note matures.*⁴ In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment.⁵ It was said, by the court in Talliaferro's Ex'rs. v. King's Admr.,⁶

¹ Randolph Com. Paper, s. 739.

² Grafton Bank v. Doe et al., 19 Vt., 463.

³ National Bank of North America v. Kirby, 108 Mass., 497.

⁴ Catlin v. Lyman, 16 Vt., 44.

⁵ 1 Aik., 410; Austin v. Imus, 23 Vt., 286.

⁶ 9 Dana, 331, (35 Am. Dec., 140.)

“ The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable as if a specific sum equal to the amount of interest had been promised; and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration in damages for the detention or non-payment.”

It is true that at the maturity of the notes the defendant would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the court in *National Bank of North America v. Kirby*, supra. In *Howe v. Bradley*,¹ it is held that when a note is made payable at some future period, with interest annually till its maturity and no demand is made for the annual interest as it becomes due, or if made, no notice thereof is given the indorser, if duly notified of the demand and non-payment when the note falls due, is liable for the whole amount due, both principal and interest; that the obligation imposed by the law upon the holder is only to demand payment and give the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would not follow the omission to give him annual notice of such default. *A note is not dishonored by a failure of the maker to pay interest.*²

¹ 19 Me., 31.

² *First National Bank v. County Commissioners*, 14 Minn., 77 (100 Am. Dec., 196, note).

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest, which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defences to the note at its maturity which will release the maker and consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the *maker* should be compelled to pay interest before his liability has been fixed to pay the principal, but that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt so that as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal.

The Indorser's Contract.—The question is whether the indorser, by the act of indorsement, promises to pay anything on the note till its maturity, at which time he clearly may be made liable for both principal and interest. The note bears upon its face an absolute promise by the *maker* to pay the principal when it becomes due and the interest thereon annually. His promise is two-fold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now what is the nature of the contract which the indorser makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it and delivers it to the indorsee he directs the payment to be made to the latter, and in effect represents that the maker has promised to pay certain sums of money according to the terms of the note, that is, the principal at maturity and the interest annually; that if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability to pay *interest* and *principal*, as each respectively falls due, arises from his contract. It is his contract that he will make

payment whenever the maker is in default and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures and then collect it with the principal. He may, however, by the contract, collect it as it falls due, of the maker, and upon the latter's default, of the indorser.

Presentment, Demand and Notice Necessary to Charge an Indorser with the Payment of Installments of Principal.—The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen., 8, c. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of *DeHavilland v. Bowerbank*,¹ interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract interest stands like the principal in respect to the rights and liabilities of an indorser.² In *Jennings v. Napanee Brush Co.*,³ in a learned opinion by McDougall, J., it was held that where there was an *express contract to pay interest annually or semi-annually, it was not different from a contract to pay an installment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it.* In that case the indorser was released from payment of the first two half-yearly installments of interest for want of demand and notice.

While we adhere to the doctrine laid down in *Grafton Bank v. Doe, et. al.*, supra, that interest is in general an incident of the debt, it is consistent to hold that where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guarantees the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract.

¹ 1 Camp., 50.

² Sedg. on Dam., 383; *Selleck v. French*, 1 Conn., 32, (6 Am. Dec., 189, note.)

³ Reported in *Canada Law Jour.*, Vol. 20, No. 19.

The case of *Codman v. The Vt. and Can. Railroad Co.*,¹ has been brought to our attention. The trustees and managers of the Vermont Central Railroad Co. and the Vt. and Can. Railroad Co., issued notes to the amount of \$1,000,000 in sums of \$1,000 each, payable to the defendant company, in twenty years from their date, with interest semi-annually on presentation of the interest coupons made payable to bearer and attached to the notes. On each note was this indorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The coupons were not indorsed. The notes were put on the market and the plaintiff purchased fifty of them, and subsequently, after due demand, notice and protest, brought this suit to recover the amount of two coupons on each of his notes, the notes themselves not having matured. Without passing upon the question whether the guaranty was negotiable and available to the plaintiff, as a remote holder, Wheeler, J., among other questions that arose in the case, decided that the indorsement was a contract of indorsement running to the bearer, and that *demand, notice* and *protest* fixed the liability of the indorser to pay the coupons, and gave judgment for plaintiff for the amount of the coupons.

Statute of Limitations — Annual Interest.—The Supreme Court of the United States has repeatedly held that the statute of limitations begins to run upon interest coupons payable annually or semi-annually, from the time they respectively mature, although they remain attached to the bonds which represent the principal debt.² Where the indorser is the payee of the note there would seem to be no difference in his liability in respect to interest whether the maker's promise to pay it is contained in the body of the note or in interest coupons not indorsed, the notes to which they are attached being indorsed, and the coupons being mentioned in the notes; but it is unnecessary to decide that question here.

¹ 16 Blatch., 165.

² *Amy v. Dubuque*, 98 U. S., 470.

Upon the facts found by the county court this action cannot be maintained for the reason that the plaintiff never fixed the defendant's liability to pay the three years' accrued interest. It does not even appear that the makers refused payment of it or that they were requested to pay it before this suit was brought; therefore nothing is due from the defendant to the plaintiff.

Judgment affirmed.

Ross, Ch. J., dissents.

Ross, Ch. J. I concur in the disposal made of this case; and in most of the grounds and reasoning of the opinion. But I do not see my way clear to concur in holding, that an indorser upon a promissory note, payable on time, with the interest annually, can be made chargeable for the payment of the interest, before he can be, and is, charged with the payment of the principal. By placing his name on the back of the note as an indorser, without making any limitation upon his indorsement, he guarantees its payment, upon condition that the indorsee, when the time named in the note for its payment arrives, shall present it to the maker and demand its payment, and, if the maker fails to make payment, shall seasonably notify him of such failure. When this is done, the indorser promises to pay whatever of principal and interest, is then due upon the note. This condition attaches primarily to the principal of the note. I think it attaches to the interest only as it becomes a part of the principal. It seems to me to be illogical, and pressing the indorser's conditional undertaking beyond its proper scope and office, to hold that he can have his liability fixed to pay for the use, or legal rental of the principal, before his liability to pay the principal is fixed. Interest is legal damage, fixed usually by statute, for the detention and use of money. As soon as the money is due and payable, the law implies damage for its detention and use. It may also arise from the contract, for the detention and use of the principal before it is payable by the terms of the contract. When stipulated to be paid annually, it may be collected from the maker of the note at the end of each

year, because such is his contract.¹ It is an incident, and outgrowth from the principal. The promise to pay it, whether implied or expressed, is a dependent promise. It is attached to and arises from the promise to pay the principal. When the interest is stipulated to be paid annually, and before the principal is payable, the maker when sued for the annual interest, because his promise to pay it is dependent upon his promise to pay the interest, may set up any defence to the suit for recovering the annual interest, which he could if the suit were for the recovery of the principal, such as fraud in the inception of the note; or want or failure of consideration, or duress, or that his liability for the principal is conditional, the terms of which have not been complied with. If he defeats the action, it will estop the holder from recovering the principal when due, and *vice versa*.

The opinion recognizes this intimate, attached and dependent relation of the promise to pay the interest annually to the promise to pay the principal, from which the interest springs. It recognizes that the statute of limitations does not begin to run on such promise to pay interest annually until the principal falls due, in accordance with *Grafton Bank v. Doe et al.*² This must be because, until severed by enforced collection or payment, interest is but an incident, and dependent of the principal. It also recognizes this relation in holding that the indorsee may allow the interest to accumulate, and may fix the indorser's liability to pay it, by a proper demand, default and notice in regard to the principal when that falls due. That is because liability for the principal carries its dependencies. I concur in the holdings. They are supported by the decisions cited in the opinion. But they rest, and, in my judgment, can rest only on the basis that the promise to pay the interest annually, both for its consideration and enforcement is dependent upon the promise to pay the principal. The opinion also holds that the liability incurred by the indorsement is conditional, that that condition attaches to the

¹ Ross, Ch. J., has not kept in mind that the contract of an indorser is in the nature of a guaranty that the maker will do exactly what he promised to do.

² 19 Vt., 463.

entire note, and that the liability of the indorser must be fixed by demand, default and notice, in regard to the interest payable from the maker yearly, as well as in regard to the principal. It then seems to conclude, that, because the indorsee can lawfully demand and collect of the maker, whose promise to pay the principal is absolute, upon his dependent, but yet absolute promise to pay the interest annually, he can by proper demand, default and notice, collect such annual interest of the indorser whose promise and liability to pay the principal is conditional, and cannot as yet be made absolute, and whose promise to pay the annual interest, it has already held is dependent upon his promise to pay the principal, and therefore, in my judgment, takes the condition attached to his liability to pay the principal. It is at this point that I fail to follow the reasoning of my associates. Here they assume—as I think—and proceed upon the basis, that, the indorser's implied promise to pay the annual interest, is not dependent, but independent, like what it would be, if it were an installment of the principal. The holdings in the opinion, that the indorser's liability for the accrued annual interest may be made absolute by a proper demand, default and notice in regard to the principal when it falls due, and that it may also be made absolute by a proper demand, default and notice yearly, result in holding that the maker's promise to pay the interest annually which he indorses, is both dependent upon, and independent of, his promise to pay the principal. I do not think that it has this double and inconsistent character, but only the former. If it be independent, must not demand and default be made, and notice given yearly, or the indorser become discharged? And if demand and default be made, and notice given annually, must not the statute of limitation begin to run from date of such demand? I think so. The result of giving this double character to the promise to pay interest annually will lead, I think, to some difficult legal problems. If the note is to mature at the end of twenty years, and the payee holds it and allows the interest to accumulate for ten years, and then having indorsed it, sells it, the indorsee must wait for the accumulated interest until the note falls due, because the maker's promise and the indorser's liability in regard

to that interest is dependent upon the indorser's liability for the maker's promise to pay the principal, which is still conditional, and for that reason the indorser's liability to pay the accumulated interest is conditional, and will remain so until it is made absolute for the principal; but when the eleventh year's annual interest falls due, the indorsee may at once, by due demand, default and notice, fix the indorser's liability to pay that year's interest, and may enforce its payment by suit, while the indorser's liability for the payment of the principal from which the year's interest springs, cannot for years be made absolute and may never be. After the indorser's liability for the payment of the year's interest has thus become fixed by suit, on what legal principles governing *res judicata*, could the indorser defend, in a suit brought, without further demand, default and notice, at the maturity of the note, for the enforcement of the payment of the principal and the ten years accumulated interest?

The only decision relied upon for the holding of my associates is from 6 Blatchford. I do not regard that in point. The guarantee was written instead of implied. The relation of the indorser to the obligation was exceptional, it having been given by its receivers and managers. The interest was expressed in separate coupons, which, for some purposes, are treated as independent obligations. The statute of limitations runs on them generally from their maturity.¹ In this respect they are unlike the promise in the note to pay the interest annually, as held in *Grafton Bank v. Doe, et. al.*² I do not think that the indorsee has the election to fix the indorser's liability for, and recover of him annually such yearly interest, or to wait and fix it by proper demand, default and notice in regard to the principal. I think his liability can only become absolute for the payment of the incident or outgrowth of the debt, when it becomes absolute for the payment of the principal from which that incident or outgrowth springs. The opinion on this branch of the case is made to rest upon the ground that the indorser's undertaking, on due demand and notice, is to make good to the indorsee any failure of the

¹ *Amy v. Dubuque*, 98 U. S., 470 (25 L. C. P. Co., 228.)

² 19 Vt., 463.

maker to perform the contract, and, in that the maker has promised to pay the interest at the end of each year, the indorser has likewise so undertaken upon proper demand and notice. But his implied contract being conditional in regard to the payment of the principal I think is conditional also to any incident or outgrowth of the principal, so long as it is conditional in regard to the payment of the principal, and

The Amount for which Indorsers are Liable.—(a). *They are Liable for a Deficiency on Notes Secured by a Mortgage.*—An indorser of a promissory note, secured by a mortgage given by the maker, is liable for any deficiency resulting after a sale of the mortgaged premises under a judgment of foreclosure against the mortgagor, providing the requirements of presentment, demand, and notice of dishonor were complied with. *Allin v. Williams*, 97 Cal., 403; 32 Pac. Rep., 441.

(b). *They are Liable for Attorney's Fees.*—An indorser, by his contract of indorsement, promises, among other things, that he will discharge the note according to its tenor, upon due presentment, demand, and notice of dishonor. Therefore an indorser of a bill or note which contains a stipulation for “reasonable attorney fees” “or collection fees” in case of suit, is as much liable for these amounts as he is for the principal of the bill or note. *Benn v. Kutzschan*, 24 Oregon, 28; 32 Pac. Rep., 763.

(c). *They are not Liable to Each Other—There is no Contribution.*—Each indorser guarantees the payment of the contract (unless otherwise stipulated in the indorsement) to every subsequent holder of the instrument. Each subsequent holder may recover the full amount due upon the contract from any one of the prior indorsers. *No prior indorser can insist* or compel a subsequent indorser to contribute to the payment of the contract, unless otherwise stipulated. There is no contribution between indorsers as a general rule in the absence of a special agreement. *Young v. Ball*, 9 Watts. (Pa.), 139 (1839); *Core v. Wilson*, 40 Ind., 206; *Shaw v. Knox*, 98 Mass., 214; *Bishop v. Hayward*, 4 Term., 470 (1791); *Penny v. Innes*, 1 C. M. & R., 439; *Easterly v. Barber*, 66 N. Y., 443; *Barrey v. Ranson*, 12 N. Y., 462; *Phillips v. Preston*, 5 Howard, 278; *Givens v. Merchants' Bank*, 85 Ill., 443; *Hale v. Danforth*, 46 Wis., 555.

If, however, a subsequent indorsee holds collateral security from the maker and a prior indorser is called upon to pay the contract, he (prior indorser) may compel an appropriation of the collateral security to the payment of the instrument. In such case a trust is created in favor of the prior indorsers as well as the holder, to have the fund applied in the payment of the note. *Price v. Trusdell*, 28 N. J. E. R., 200.

The indorsement may be joint, in which case, of course, con-

that he only becomes absolutely bound to pay the interest at the end of each year, when he becomes bound absolutely to pay the principal. When so bound for the payment of the principal, then this obligation to pay the interest at the end of each year attaches, in respect both to the interest then accrued and the interest which may thereafter accrue. I would modify the opinion in the particular indicated.

tribution may be enforced. *Lane v. Stacey*, 8 Allen (Mass.), 41.

(d). *They are Liable for the Full Amount due Upon the Bill or Note.*—It may be stated generally that an indorser is liable for the full amount of the contract, including interest, protest fees and all costs of collection. 1 Daniel on Neg. Inst., secs. 766–768; *Merritt v. Benton*, 10 Wend., 116; *Simpson v. Griffin*, 9 Johns., 131; *National Bk., etc. v. Green*, 33 Ia., 140; *Durant v. Bunta*, 3 Dutch (N. J.), 623, 635; 2 Parsons on N. & B., 428; *March v. Barnet*, 114, Cal., 375.

(e). *Where Indorsee has Paid Less than Amount of Bill or Note—For what Sum is the Indorser Liable?*—There is much conflict in the authorities upon the question of how much may an indorsee recover of an indorser when the former has paid less than the full amount for the bill or note. 1 Daniel on Neg. Inst., secs. 766–768; *National Bank, etc. v. Green*, 33 Ia., 140. If the transaction was in good faith, we think the weight of authority permits the indorsee to recover the full amount of the contract. *National Bk., etc. v. Green*, supra; 2 Parsons, N. & B., 428; *Bissell v. Dickerson*, 64 Conn., 61; *Cromwell v. County of Sac*, 96 U. S., 51, 60; *R. R. Co. v. Schutte*, 103 U. S., 118.

The Consideration of the Indorser's Contract.—It is a well recognized rule of law that every binding contract must be supported by a consideration, and the contract of indorsement is no exception to this rule. But in the case of commercial contracts the consideration is presumed; this presumption, however, as between the original parties may be rebutted. *Dan. on Negot. Inst.*, secs. 174, 679.

What is a sufficient consideration to support contracts in general is sufficient to support contracts of indorsements. *Swift v. Tyson*, 16 Pet., 1; *Pond v. Waterloo*, 50 Iowa, 695; *Bradsley v. Delp*, 88 Pa. St., 420; *Collier v. Mahan*, 21 Ind., 110.

The rule is well settled that in order to charge an indorser, presentment and demand for payment, of the maker (or the facts which excuse such presentment and demand), and notice of dishonor, must be proven by the plaintiff. *Ankeny v. Henry*, 1 Idaho, 229; *Ballingalls v. Gloster*, 3 East., 481; *Story on Bills*, 224, 255; *Wood's Byles*, 255.

SECTION 47.

THE NEGOTIABILITY OF A COMMERCIAL CONTRACT CANNOT BE RESTRAINED, AFTER AN INDORSEMENT IN BLANK BY THE PAYEE, BY AN INDORSEMENT IN FULL OR SPECIAL.*

SMITH v. CLARKE.¹

IN THE COURT OF KING'S BENCH, 1794.

[*Reported in 1 Espinasse, 181; Peake, 225.*]

The Form of Action.—Assumpsit against the defendant as acceptor of a bill of exchange.

The bill was drawn in favor of Lisle & Co. and they had indorsed it to Surtees, Burden & Co., who had indorsed it to one Jackson: the first indorsement was general (in blank), but

¹ This case is cited in Benjamin's Chalmers on Bills, Notes and Checks, 128; Story on Bills of Exchange, 207; Chitty on Bills, 228, 230; Wood's Byles on Bills and Notes, 251; Norton on Bills and Notes, 113, 117, 197; Daniel on Negotiable Instruments, 696. See also Walker v. McDonald, 2 Exch., 527; Johnson v. Mitchell, 50 Tex., 212.

* Where a bill is by the payee indorsed in blank, a subsequent indorsee shall not by any special indorsement restrain its general negotiability, so far as to make it necessary to prove the handwriting of such special indorsee, where the action is by a subsequent *bona fide* holder. Where a bill or note is made payable to the "order" of the payee and indorsed in "blank" by him, it is then the same as if it had been made payable to "bearer" originally. But even though the instrument is made payable to "bearer" a particular subsequent indorser may, by a special or restrictive indorsement, limit *his* liability, because each indorsement is a new contract and the parties to it are liable only according to its terms. Curtis v. Sprague, 51 Cal., 239; Humphreyville v. Culver, 73 Ill., 485; Bank of, etc. v. Sherer, 108, Cal., 513; Beal v. Glen. Elect. Co., 38 N. Y., 527.

Indorsement—Kinds or Varieties of—Enumerated.—Contracts of indorsement have assumed numerous forms, and the primary liability of an indorser depends upon the form or kind of his indorsement. The indorsement may be (1) in blank, (2) in full or special, (3) implied or conditional, (4) restrictive, (5) absolute, (6) without recourse, (7) for accommodation, (8) irregular or anomalous.

Blank Indorsement—Defined.—Where the payee or holder of a commercial contract writes his name across the back of such

the indorsement to Jackson by Surtees, Burden & Co. was a special one, viz., "Pay the contents to J. Jackson, or order."

Jackson was the receiver-general of one of the northern counties, and kept an account with Muir, Atkinson & Co.

instrument without any additions or explanations it is called an indorsement in blank, and the contract thereafter is the same as one payable to bearer; it may be transferred by delivery, and its possession is *prima facie* evidence of ownership. *Palmer v. Nassau Bank*, 78 Ill., 380; *Morris v. Preston*, 93 Ill., 215; *Belden v. Hann*, 61 Iowa, 41.

It has been held that the holder can fill up the blank indorsement and make it an indorsement in full, making it payable to himself, to his own or to another's order. He may change it into any contract not inconsistent with the character of indorsement in blank, but he may not enlarge the liability of the indorser in blank by writing over it a waiver of any of his rights. The indorsement in blank may be either before or after the complete execution and delivery of a commercial contract. *Central Bank v. Davis*, 19 Pick., 376; *Hance v. Miller*, 21 Ill., 636; *Scott v. Calpin*, 139 Mass., 529, where it was held that the indorsee might write over the blank indorsement "I guarantee payment of the within note." *Contra. Belden v. Hann*, *supra*.

Indorsement in Full or Special—Defined.—An indorsement in full, which is sometimes called a special indorsement, is where the indorser directs that the contract shall be paid to some "particular person or his order." To illustrate: "Pay to B or order," (signed) A; "Pay to B," (signed) A. It has been held that there is no distinction between the indorsements "Pay to B or order," and "Pay to B"; and the phrase "or order" makes no change in the special indorsement. In case of a special indorsement of a commercial contract, to enable any subsequent party to recover thereon he must be able to make his title through the special indorsee. Therefore it must appear that the contract has been re-indorsed by the special indorsee, or that he (special indorsee) has received satisfaction. The mere possession of a commercial contract which has been indorsed in full and which has not been indorsed by the special indorsee is not sufficient evidence of the holder's right of action thereon. The special indorsee in his transfer of the contract may use any of the regular forms of indorsement he desires; and if he uses a blank indorsement, the contract thereby becomes transferable by mere delivery. *Mitchell v. Fuller*, 15 Pa. St., 268; *Johnson v. Mitchell*, 50 Tex., 212; *Reamer v. Bell*, 79 Pa. St., 292; *Morris v. Preston*, 93 Ill., 215.

In case there are several indorsements in blank, the holder may strike out any one or change them to some other form of indorsement, so long as he does not affect his own title or increase

This bill had been sent among others to Muir, Atkinson Co., desiring them to get it discounted anywhere, provided it did not come to the Bank of England; but there was no evidence of any indorsement by Jackson on it.

the liability of indorsers. He may not, however, strike out a special indorsement and insert his own name, for the reason that he thereby destroys his own title. *Johnson v. Mitchell*, 50 Tex., 212, where Gould, J., said, "The rule is well settled that if a bill be once indorsed in blank, although afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself, title must be made through his indorsee."

The holder of a contract which has been indorsed in blank may change it to one in full and make the contract thereby payable to some particular person. *Johnson v. Mitchell*, 50 Tex., 212; *Hance v. Miller*, 21 Ill., 636.

Conditional Indorsement—Defined.—An indorser may impose some condition upon his liability in the contract of indorsement and he would not be liable thereon if such condition is broken or unfulfilled. And if the party who is primarily liable upon the principal contract pays the amount to such conditional indorsee before the performance of the condition, this fact will not preclude a recovery for the full amount by the conditional indorser in an action against him. The party who is primarily liable upon a commercial contract is bound to take notice of conditions imposed or annexed to indorsements thereon. *Dan. on Negot. Inst.*, Sec. 697; *Robertson v. Kensington*, 4 Taunt., 30.

These conditions may be either precedent or subsequent. To illustrate: An indorsement "Pay to A if he arrives at twenty-one years of age," or "if he is living when it becomes due," is an indorsement upon a condition precedent; and if the maker of such contract should pay to such indorsee before the happening of such condition, he might again be called upon to pay the contract to the conditional indorser. This is true whether the condition be precedent or subsequent. An example of an indorsement upon a condition subsequent would be, "Pay to A unless before payment I give you notice to the contrary." *Robertson v. Kensington*, *supra*; *Story on Bills*, Sec. 217; *Chitty on Bills*, ch. 6, p. 268.

Restrictive Indorsement—Defined.—An indorser may not only impose conditions upon his liability as an indorser, but he may restrict the further negotiability of the instrument, in which case the indorsement is called restrictive. To illustrate: "Pay to A only" (signed) B; or "Pay to A for the use of B"; or "Pay to A for my use"; or "for collection"; or "for collection and immediate returns"; or "credit my account"; are examples of restrictive indorsements. An examination of the various re-

Muir, Atkinson & Co. discounted it with the plaintiffs, who were their bankers.

Muir & Atkinson became bankrupts, and soon after Jackson also became a bankrupt; and this defense was in fact by

restrictive indorsements will show that they may be divided into two classes: (1) where they are indorsed for the use of the indorser, or to an agent; and (2) where they are indorsed for the use and benefit of some third person, or to a trustee. In the first of these cases, or in a restrictive indorsement to an agent, the indorser still retains the title to the contract; while in the second the title passes from the indorser to the trustee upon condition. In either case, however, the restrictive indorsee has no authority to indorse the contract to another—he is only authorized to collect the amount due upon said contract and apply it according to the terms of the indorsement. The terms, annexed to a restrictive indorsement, are notice to all subsequent holders of the nature thereof. Neither does the indorser incur any liability to the indorsee in a restrictive indorsement. *Nat. Butchers' Bk. v. Hubbell*, 117 N. Y., 384; *Manf. Nat. Bk. v. Contanentile*, 148 Mass., 553; *First Nat. Bk. v. First Nat. Bk.*, 76 Ind., 561; *Briggs v. Central Nat. Bk.*, 80 N. Y., 182; *Ætna Ins. Co. v. Alton City Bk.*, 25 Ill., 243; *Dan. on Negot. Inst.*, Sec. 698; *Johnson v. Donnell*, 90 N. Y., 1; *White v. Miner's Nat. Bk.*, 102 U. S., 658; *Hook v. Pratt*, 78 N. Y., 371; *Leavitt v. Putman*, 3 Coms., 499; *People's Bank v. Jefferson Co., etc., Bk.*, 106 Ala., 624 (17 So. Rep., 728); *Freeman's Nat. Bk. v. National Tube Works*, 151 Mass., 413; 24 N. E. Rep., 779; 21 Ans. St. Rep., 461; *Bank v. Weiss*, 67 Texas, 331; *Blakeslee v. Hewitt*, 76 Wis., 341; 44 N. W. Rep., 1105. An indorsement for "collection" is not a contract of indorsement, but the creation of a power, the indorsee being a mere agent or trustee to receive the money for the use of another. *Freeman v. Exchange Bk.*, 87 Ga., 45; 1 *Daniel on Neg. Inst.*, Sec. 698. See *Hook v. Pratt*, 78 N. Y., 371, for a full discussion of the nature of a restrictive indorsement; *Edie v. East India Co.*, 2 Burr., 1221; *Sigourney v. Lloyd*, 8 B. & C., 622; *Fennings v. Brown*, 9 Mees & W., 496; *Brook, Oliphant & Co. v. Vannest*, 58 N. J. L., 162; *Commercial Bk. v. Armstrong*, 148 U. S., 50; *Butcher's, etc. Bk. v. Hubbell*, 117 N. Y., 384; *Power v. Finnie*, 4 Call (Va.), 411.

An Absolute Indorsement—Defined.—An absolute or unconditional indorsement is one by which the indorser makes himself liable, binds himself to pay the contract in case the maker or the party who is primarily liable thereon does not, subject to the condition, however, of presentment, demand, protest (when necessary) and notice.

Indorsement Without Recourse—Defined.—There is still another method by which an indorser may limit his liability in the contract of indorsement. It is by an indorsement "sans

his assignees, on the ground that the indorsement to Jackson being special, that it restrained the farther negotiability of the bill and defeated the plaintiff's right to recover, unless Jackson's indorsement was proved.

recours," or "without recourse," or by adding the words "at the owner's own risk," or by using any term or phrase which indicates that he does not intend to incur liability as an indorser. Such an indorsement has the effect of transferring the title of the instrument to the indorsee without rendering the indorsee personally responsible on the contract. An indorser without recourse assumes the same liability that a transferer does without indorsement, of a commercial contract payable to bearer, being released from all liability for the dishonor of the bill based upon the incapacity or refusal of the maker to pay.

He is not, however, released from all liability. He impliably warrants:

1. That the original parties had capacity to execute and deliver such a contract;
2. That they did execute and deliver the particular contract;
3. That there is no illegality or defense existing between the original parties which can be interposed to defeat the payment of a contract;
4. That he has a good title to the instrument.

In short, an indorser without recourse warrants that the contract is a valid, subsisting contract; but does not warrant that the original makers will pay, or that they are solvent. *Dumont v. Williamson*, 18 Ohio St., 515; *Chitty on Bills*, 247; *Watson v. Chesire*, 18 Iowa, 202; *Bourdon v. Collar*, 26 Mich., 410; *Rieman v. Fisher*, 4 Am. Law Reg., 433; *Allen v. Pegran*, 16 Iowa, 163; *Challiss v. McCrum*, 22 Kan., 157; *Drenian v. Bung*, 124 Ill., 175.

Accommodation Indorsement.—Defined.—An accommodation maker or indorser of a commercial contract is one who has signed or executed and delivered a commercial contract without consideration and for the purpose of giving his name to some other person as a means of credit. As to third persons, the liability of an accommodation party to a commercial contract, whether maker, drawer, acceptor or indorser, is the same as that of corresponding parties receiving valuable consideration; but between the accommodation party and the accommodated party there is no such liability, and one who draws, makes, accepts or indorses a commercial contract for the accommodation of another is not liable to him in any capacity. *Miller v. Larned*, 103 Ill., 562.

As to third parties who take the contract before maturity, an accommodation party is liable according to the terms of his contract, whether it be that of maker, drawer, acceptor or indorser; and it makes no difference whether the holder or third person took

The Claim of the Plaintiff.—For the plaintiff it was contended, that the first indorsement being general, that the bill thereby acquired a general negotiability; nor could it by any subsequent indorsement be restrained; and that how

the note with knowledge that the parties were accommodating parties, or not, providing that they are otherwise *bona fide* holders. 1 Parsons on Notes and Bills, 183, 226; Nat. Bk. v. Grant, 71 Me., 374; Winters v. Home Ins. Co., 30 Iowa, 172; Miller v. Larned, supra; Seyfert v. Edison, 45 N. J. L., 393; Norfolk Nat. Bk. v. Griffin, 107 N. C., 173.

It has been held also that an accommodation party is liable according to the terms of his contract to a holder or indorsee, in good faith, as collateral security for an antecedent debt or in payment of a pre-existing or concurrent debt of such holder or indorsee. Miller v. Larned, supra; Pitts v. Fogelsing, 37 Ohio St., 676; Altoona Bk. v. Dunn, 151 Pa. St., 228.

There may be successive accommodation indorsers upon the same contract, and in which case they will be liable to each other according to the priority of their indorsement. Accommodation indorsers are not co-sureties in the absence of an agreement to that effect, therefore, contribution does not lie between them. A subsequent accommodation indorser who pays the note may recover the full amount of a prior indorser and not merely a contribution as in case of co-sureties. Moody v. Findley, 43 Ala., 167; DePauw v. Bank, 126 Ind., 553; Esterly v. Barber, 66 N. Y., 433; Shaw v. Knox, 98 Mass., 214; McGurk v. Huggett, 56 Mich., 187; Kelly v. Burroughs, 102 N. Y., 93.

Some of the courts have held, however, in the case of accommodation indorsers, that they are considered as co-sureties where there is no special agreement to the contrary, and that subsequent indorsers cannot recover more than a contributive share against a previous indorser. Douglas v. Waddle, 1 Ohio, 413; 13 Am. D., 630; Barnett v. Young, 29 Ohio St., 11; Pitkin v. Flanagan, 23 Vt., 160.

It has been held that an accommodation party to a commercial contract is not liable thereon if it has been fraudulently diverted from the purpose for which it was intended to a person who has knowledge of such diversion, even if he pays value for it and acquires it before maturity. Grocer's Bk. v. Penfield, 69 N. Y., 502; 25 Am. R., 231; Daggett v. Whiting, 35 Conn., 366; Fetters v. Muncie Nat. Bk., 34 Ind., 251; 7 Am. R., 225.

Diversion cannot be shown, however, against a *bona fide* holder for value without notice. Clark v. Thayer, 105 Mass., 216; Frank v. Quast, 86 Conn., 649; Jackson v. First Nat. Bk., 42 N. J. L., 177; Meeker v. Shanks, 112 Ind., 207.

The rule that equities may be interposed against the purchaser after maturity applies to an accommodation contract; and some of

many names soever appeared on the back of the bill, or however many special indorsements such as the present, that the *bona fide* holder might strike out the names of all the inter-

the courts have held that the paper as an accommodation paper of itself constitutes an equity under such circumstances. This, however, is contrary to the weight of authority. An accommodation indorser is liable under the same conditions and to the same extent as a regular indorser.

Agents, Corporations and Partners Cannot Execute and Deliver Accommodation Commercial Contracts Without Express Authority.—There is some question whether an agent, a corporation, or a partner may execute and deliver an accommodation commercial contract without express authority. It has been held that a general power given to an agent to make or indorse commercial contracts will not warrant the agent in executing and delivering or indorsing contracts for accommodation. *German Nat. Bk., v. Studley*, 1 Mo. App., 260; *Gulick v. Grover*, 33 N. J. L., 463; 97 Am. D., 728.

A corporation has only such powers, as a general rule, as are expressly given it or necessarily implied from the nature and character of its business. It has been held that the indorsement of commercial contracts for accommodation by a corporation is not a necessary incident to the business of a corporation. If, therefore, a corporation is not expressly authorized to execute and deliver a commercial contract for accommodation and it does so, the corporation is not liable thereon. *Nat. Bk. v. Wells*, 79 N. Y., 498; *Smead v. Indianapolis, etc.*, 11 Ind., 105.

As a general rule one partner cannot without express or implied authority bind the firm in the execution and delivery of an accommodation contract. *Sweetzer v. French*, 2 Cushing, 309; 48 Am. D., 666; *Bank of Ft. Madison v. Alden*, 129 U. S., 372; *Heffron v. Hanford*, 40 Mich., 305.

And in case a partner does execute and deliver an accommodation commercial contract, the burden is on the holder to show that such partner was expressly authorized to bind the firm. *Sweetzer v. French*, supra; *Nat. Security Bk. v. McDonald*, 127 Mass., 82; see a general discussion of the rights and liabilities of accommodation parties, 31 Am. St. R., 742, 757.

General Effect of an Indorsement.—The indorser by placing his name upon the instrument enters into a contract with the indorsee, which is a complete contract independent of the contract of any other party to the paper, and requires all the essential elements of a contract. He thereby engages that the commercial contract upon which his endorsement is placed will be paid when due according to the tenor thereof, upon due presentment and demand by the parties to that contract; and if not, then by himself on receiving due notice of their failure. The contract

mediate indorsers, and prove only the first indorsement in order to entitle him to recover.

The Claim of the Defendant.—The counsel for the defense insisted, that its negotiability could at any time be restrained; and cited *Ancher v. Bank of England*¹ as deciding the point; but they further pressed, as a general question, the propriety of admitting special indorsements, for the purpose of greater security in the remitting of bills of exchange by

of an indorser of a commercial contract is the same as that of a drawer of a bill of exchange or other commercial contract. The purpose of an indorsement is usually two-fold: (1) to transfer the title to the instrument; (2) or to strengthen the security. The liability of a indorser, outside of the warranties which he makes, must always depend upon the kind of indorsement. The first indorser is responsible to every holder and subsequent indorser who has been compelled to pay the amount of the note, upon due presentment, demand and notice. *McKnight v. Wheeler*, 6 Hill, 492; *Maine Trust Co. v. Butler*, 45, Minn., 506; *Ankeny v. Henry*, 1 Idaho, 229; *Rhodes v. Jenkins*, 184, Col., 449; *Aymar v. Sheldon*, 12 Wend., 438.

If the commercial contract is overdue, the indorsement is equivalent to drawing a new contract payable at sight, upon which the indorser is liable upon proof of a demand upon the maker within a reasonable time, and immediate notice of the default. *Colt. v. Barnard*, 18 Pick., 260; 29 Am. D., 584; *Leavitt v. Putman*, 3 N. Y., 494; 53 Am. D., 322.

Some of the courts have held that an indorsement upon an over-due commercial contract is an original and unconditional engagement to pay the same, without presentment, demand and notice. *Brown v. Davies*, 3 T. R., 80; *Jordan v. Hurst*, 12 Pa. St., 269.

The mere indorsement of the name of the payee or holder on a negotiable contract is ineffectual to pass the title thereto without delivery. The term "indorsement" implies a delivery. If the contract is payable to "bearer," it may be transferred by delivery without indorsement. This is true also when it is payable to "order," after being indorsed in blank. *Spencer v. Carstarthen*, 15 Col., 445; 24 Pac. R., 882; *Loyd v. Howard*, 152 B., 995; *Mars-ton v. Allen*, 8 Mees & W., 454; *Ross v. Smith*, 19 Tex., 171; *Smalley v. Wight*, 44 Me., 442.

The promise of the indorser is conditional and his liability depends upon due presentment, demand, protest (when necessary) and notice. *Mt. Mansfield Hotel Co. v. Bailey*, 64 Vt., 151; 24 Atl. R., 136.

¹ Doug., 615.

post; to which the restriction contended for would greatly contribute.

The counsel for the plaintiff admitted that the payee might restrain the negotiability of a bill by a special indorsement; but contended that it was confined to him, and did not extend to any subsequent indorser; and that the case cited of *Ancher v. Bank of England* established that point as to the payee only.

Decision.—Ld. Kenyon ruled with the plaintiffs. He said that the doctrine contended for by the defendant's counsel was not supported by any case; that it would clog the circulation of bills of exchange if by indorsements of this sort, where there might be several, the holder was obliged to prove the handwriting of the several indorsers; that a bill being payable generally to a payee or his order, when he to whose order only it was payable, by a blank indorsement, sent it into the world, that he meant it should have a general circulation. That any person to whose hands it came *bona fide*, by proving the handwriting of the payee, entitled him to sue,¹ that as this gave him a legal title, he might strike out the names of all the intermediate indorsers, whether the indorsements to them were special or not.²

The plaintiff had a verdict.

¹ Vide *Moor v. Manning*, Com., 311; *Acheson v. Fountain*, 1 Stra., 557; *Morris v. Foreman*, 1 Dal., 193.

² *Chaters v. Bell et al.*, post, vol. 4, p. 210. After a special indorsement by the payee, a subsequent indorser may again make the bill negotiable *from him*. *Holmes v. Hooper*, Bay, 158.

Had this action been brought by any indorsee subsequent to the special indorsee against this special indorser, then it would have been necessary for him to prove the handwriting of the special indorsee. But as to any party prior to the special indorser, the maker, drawer, acceptor, payee and all prior indorsers, it is sufficient for him to prove the indorsement of the person to whose "order" the contract was made payable.

SECTION 48.

A SPECIAL INDORSER IS LIABLE ONLY TO SUBSEQUENT INDORSEES WHO MAKE THEIR TITLE THROUGH HIS SPECIAL INDORSEE. SUBSEQUENT INDORSEES MAY STRIKE OUT THE SPECIAL INDORSEMENT AND RECOVER AGAINST PRIOR INDORSERS.*

MITCHELL v. FULLER.¹

IN THE SUPREME COURT OF PA., DEC., 1850.

[*Reported in 15 Pa. St., 268.*]

The Form of Action.—This was a suit brought by Martha Ann Fuller, executrix, etc., of Horace Fuller, deceased, against Matthew Pope Mitchell and Benjamin N. Wynkoop, upon the following drafts:—

“ \$799.01.

“ *New York, April 30th, 1846.*

“ *Sixty days after date, pay to the order of ourselves, seven hundred and ninety-nine dollars and one cent, value received, which place to account of Sands, Fuller & Co.*”

“ *To Messrs. Mitchell & Wynkoop.*

“ (Accepted by) *Mitchell & Wynkoop.*”

“ (Indorsed) *Sands, Fuller & Co.*”

* According to the elementary authorities, a bill or note payable to order and indorsed in blank, so long as the indorsement continues blank, “is in effect payable to bearer.” Chit. Bills (11th ed.), 227; 3 Kent, Comm. (9th Ec.), side p. 89; Story, Bills. § 60; 2 Pars. Notes and Bills, p. 19, note w; Edw. Bills and Notes, 131, 269; 1 Daniel Neg. Inst., § 693; Greneaux v. Wheeler, 6 Tex., 522; Weathered v. Smith, 9 Tex., 625; Whithed v. McAdams, 18 Tex., 553; Ross v. Smith, 19 Tex., 172.

Ld. Mansfield said, in Peacock v. Rhodes: “I see no difference between a note indorsed in blank and one payable to bearer;” and Chancellor Kent said in Conroy v. Warren: “A note indorsed in blank and one payable to bearer are of the same nature. They both go by delivery, and possession passes property in both cases.” 2 Doug., 636; 3 Johns Cas., 263. So “a note payable to the maker’s order becomes, in legal effect, when indorsed in blank,

¹ This case is cited in Norton on Bills and Notes, 113, 117; Illustrative Cases on Bills and Notes, 130. See also Burnap v. Cook, 32 Ill., 168 contra. Johnson v. Mitchell, 50 Tex., 212; Smith v. Clarke, 1 Esp., 180.

“ \$744.77.

“ *New York, April 30th, 1846.*

“ *Ninety days after date, pay to the order of ourselves, seven hundred and forty-four dollars and seventy-seven cents, value received, which place to account of*

Sands, Fuller & Co.”

“ *To Messrs. Mitchell & Wynkoop.*

“ *(Accepted by) Mitchell & Wynkoop.”*

“ *(Indorsed) Sands, Fuller & Co.”*

To which the following affidavit of defence was filed:—

That the bills upon which said suit is brought, are both specially indorsed to J. B. Trevor, Esq., cashier, or order.

And that the writing filed in the above case, as a copy of the said bills, is not a true copy thereof, as will appear on the production of the said bills, and as defendant is informed and believes, and expects to prove.

The original drafts were as the copies set forth in the paper-book of plaintiff in error, but with the following additional indorsement:

“ *Pay to J. B. Trevor, Esq., cash, or order,*

(in red ink)

Hammond & Co.”

a note payable to bearer.” Byles Bills, p. 68, c. 7; Brown v. DeWinton, 6 Man. G. & S., 336.

The rule is well settled that “if a bill be once indorsed in blank, though afterwards indorsed in full, it was still, against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself title must be made through his indorsee.” Byles Bills (5th ed.), 109, cited by Pollock in 2 Exch. infra.; Chit. Bills, 228, 230a; 3 Kent, Comm., side p. 90; Story, Prom. Notes, § 139; 2 Pars. Notes and Bills, 19, 26; Walker v. McDonald, 2 Exch., 531, citing Smith v. Clarke, 1 Peake, 295, and 1 Esp., 180; Mitchell v. Fuller, 15 Pa. St., 270; Huie v. Bailey, 16 La., 213; Little v. O’Brien, 9 Mass., 423; Dugan v. U. S., 3 Wheat., 172; Edw. Bills and Notes, 275, citing Dollfus v. Frosch, 1 Denio, 367; Savannah Nat. Bank v. Haskins, 101 Mass., 370.

It may be objected that the safe transmission, by mail, or otherwise, of notes and bills payable to bearer requires a different rule. The answer is—First, that such a consideration will not justify a departure by the courts from established principles and precedents; second, that what is known as a “restrictive” indorsement stops the currency of negotiable paper. Chit. Bills, 232; Story Prom. Notes, § 142 et. seq.; 2 Pars. Notes and Bills, 21; 1 Daniel Neg. Inst., § 698.

The name of Hammond & Co. was erased before the notes were placed in the hands of counsel.

The case was then one of an indorsement in blank by the payees, and a special indorsement by a subsequent holder to J. B. Trevor, Esq., cashier, or order.

There was no indorsement by Trevor.

“ November 24, 1849, on motion, and upon inspection of the originals of the copies filed, judgment is granted by the court for plaintiff, for want of a sufficient affidavit of defence.”

The Claim of Defendant.—The defendant made the following claims:

1. The court entered judgment for the plaintiff below, notwithstanding an affidavit of defence had been filed.

2. The court entered judgment against the defendants, although the affidavit of defence filed set forth a full defence.

The Claim of Plaintiff.—The plaintiff claimed that the affidavit of defence alleges that the bills are specially indorsed to J. B. Trevor, Esq., cashier, or order, and, in case of special indorsement, to enable any one but the special indorsee to recover on the bill, it must appear either that it is reindorsed by the special indorsee, or that he has received satisfaction.¹ That there would be no use in a special indorsement if any holder could maintain the action without showing title in himself.² Such an indorsement cannot be stricken out by the plaintiff.³ The only exception to the rule is where the plaintiff is the drawer or a prior indorser. Where such an one comes again into possession of the bill, such possession is *prima facie* evidence of ownership.⁴

Decision.—In the case of a special indorsement of a bill of exchange or promissory note to enable any one but the special indorsee to recover on the bill, it must appear either that it is reindorsed or re-assigned by the special indorsee, or that he has received satisfaction. The mere possession of the note or bill of exchange by the indorser who had indorsed it

¹ 2 Dal., 144; 1 Yeates, 94; 12 Ser. & R., 43.

² 7 Cranch, 159.

³ 1 Peter's C. C. Rep., 171.

⁴ 3 Wheat., 183.

to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee.¹ But this rule obtains only when the note is specially indorsed by the payee, or made payable specially by the maker, for when the note or bill is indorsed in blank, the rule is otherwise. A blank indorsement makes the bill transferable by mere delivery. When the first indorsement is in blank, the bill or note as against the payee, drawer, or acceptor, is afterwards assignable by mere delivery, notwithstanding it may have subsequent indorsements in full; because a subsequent holder by delivery may declare and recover, as the indorsee of the payee, and strike out all the subsequent indorsements, whether special or not.²

In *Smith v. Clarke*,³ a bill was indorsed in blank by the payee, and after some other indorsements, indorsed to Jackson or order; Jackson never indorsed the bill, but a recovery was had by a subsequent holder who had stricken out all the indorsements but the first. *Ld. Kenyon* gives the reason for the decision. He said the doctrine contended for by the defendant's counsel was not supported by any case, and that it would clog the circulation of bills of exchange, if, by indorsement of this sort, where there might be several, the holder was obliged to prove the hand-writing of the several indorsers; that a bill being payable generally to a payee or his order, when he, to whose order only it was payable, by a blank indorsement, sent it into the world, that he meant it should have a general circulation, and any person into whose hands it came, *bona fide*, by proving the hand-writing of the payee, entitled himself to sue; that as this gave him a title, he might strike out the names of all the intermediate indorsers, whether the indorsements to them were special or not.

Thus the distinction is clearly taken; this case falls within the latter class. Since *Smith v. Clarke*, the law has been

¹This is ruled in *Gorgerat v. McCarty*, 2 Dal., 144; 1 Yeates, 94; *Zeigler v. Geary*, 12 Ser. & R., 43; 7 Cranch, 159; and in *Craig v. Brown*, 1 Peter's C. C. Rep., 174; *Reamer v. Bell*, 79 Pa. St., 292; *Lawrence v. Fussell*, 77 Pa. St., 460.

²*Chitty on Bills*, 175-6, 5th edition.

³1 Esp. Rep., 180; S. C. Peake's Rep., 225.

considered settled, and it would be dangerous now to disturb it. I know of no case where it has been even questioned. The latter class seems to be the rule, the former for special reasons, is the exception. It has always been the policy of the courts, accommodating themselves to the wishes of the mercantile world, to promote the free, unconstrained circulation of commercial paper; and hence it is they have adopted the rule that the holder may maintain suit in his own name, by striking out the special indorsements. The presumption, and it is a fair one, is that he is a *bona fide* holder for value, or a trustee or agent for collection. The rule, however, is relaxed in favor of the maker of a note, who may make it payable in full, by inserting the name in whose favor it is made, as drawee of a bill of exchange or payee of a note, who may indorse it specially for purposes of transmission and for safety, and so far to clog its circulation. Beyond this, the courts have wisely decided, they are not at liberty to go. When the note is once indorsed in blank, subsequent holders cannot control its circulation. These principles are fully sustained by the authorities.

After an indorsement in blank by the payee or subsequent indorser, it is competent for the holder of the bill or note to make himself the immediate indorsee, and to claim by the blank indorsement.¹

And where a person fairly and without fraud becomes possessed of a negotiable note, indorsed in blank, it has been held that he may maintain an action thereon, although it has not been legally transferred to him.²

An Indorsement in Blank may be Changed to a Special Indorsement.—So, where a promissory note, payable to order, is indorsed in blank, the holder has a right to fill it up with any name he pleases, and the person whose name is inserted will be deemed the legal owner; and if in fact the indorsement in blank was intended as a transfer for the benefit of another person, yet he would be considered as a trustee,

¹Taylor v. Binney, 7 Mass., 481; Mullen v. French, 9 Watts, 96.

²Little v. O'Brien, 9 Mass., 423; Bowman v. Wood, 15 Mass., 534.

suing for the benefit of the person having the legal interest.¹

This view of the case, so fully sustained by authority, is an answer to the other exception. The holder having stricken out the indorsements, the record contains a true copy of the note on which suit is brought.

Judgment affirmed.

¹ Lovell v. Evertson, 11 Johns. R., 52; 11 Ser. & R., 179, Sterling v. Marietta Co.; Curtis v. Sprague, 51 Cal., 239; Middleton v. Griffith, 57 N. J. L., 442; Berney v. Steiner Bros., 108 Ala., 111.

CHAPTER IX.

Warranties or Admission of Indorsers.*

SECTION 49.

AN INDORSER WARRANTS OR ADMITS THAT THE BILL OR NOTE IS JUST SUCH A CONTRACT AS IT APPEARS TO BE; THAT IT IS IN EVERY WAY A VALID, SUBSISTING, GENUINE CONTRACT.

EX. PARTE CLARKE.¹

IN THE HIGH COURT OF CHANCERY, MARCH, 1791.

[Reported in 3 Brown's Chancery Cases, 238.]

The Form of Action.—Petition to be admitted a creditor, in respect to certain bills indorsed by the bankrupt to the petitioner. The bills were made to fictitious payees. But

¹ This case is cited in Chalmers' Bills, Notes and Checks, 222; Chitty on Bills and Notes, 158, 705. See also Heylyn v. Adamson, 2 Burr., 669; McGregor v. Rhodes, 25 L. J. Q. B., 318; Selser v. Brock, 3 Ohio St., 302; Canal Bank v. Bank, 1 Hill., 287; Turner v. Keller, 66 N. Y., 66; Watson v. Chesire, 18 Ia., 202.

***Warranties or Admissions of Indorser.**—Every indorser of whatever kind, as well as every transferer without indorsement (where the title can be transferred without indorsement), makes certain warranties or admissions, which he is estopped from denying. A regular indorser in full or in blank warrants:

1. That the contract is in every way genuine;
2. That the prior parties thereto are competent;
3. That he has a lawful title to the instrument;
4. That he has a right to transfer the title to the same;
5. That the contract is in every way just such a contract as it purports to be and that the parties are liable thereon according to the terms of their apparent contract; and
6. That the parties who are primarily liable thereon are able to pay and will pay at maturity upon presentment and demand.

it was said, that that circumstance was of no consequence against the indorser.

Decision.—It is clear that, as against the indorser, it does not signify what the bill is. The indorsee may come

The foregoing warranties or admissions are made by every indorser without recourse, as well as by those who transfer commercial contracts without indorsement, except the last (6th). Therefore, if, in the case of an indorsement without recourse, or transfer by delivery simply, it should turn out that the original contract was a forgery, or that the original parties thereto were not liable by reason of incapacity for any reason, or that they had been discharged lawfully, or that the contract was invalid by reason of the statute or the common law or public policy, such indorser or transferer would be liable thereon by reason of a breach of his warranty or admission. Story on bills, 110, 235; Rhodes v. Jenkins, 18 Col., 49; Willis v. French, 84 Me., 593; 30 Am. St. R., 416; Frank v. Lanier, 91 N. Y., 112; Harris v. Bradley, 7 Yerg (Tenn.), 310; Erwin v. Downs, 15 N. Y., 575; Bowman v. Hiller, 130 Mass., 153; Fish v. First Nat. Bk., 42 Mich., 203; Merriden Bk. v. Gallaudet, 120 N. Y., 298; Selser v. Brock, 3 Ohio St., 302; Dumont v. Williamson, 18 Ohio St., 515; 98 Am. D., 186; Turnbull v. Bowyer, 40 N. Y., 456; Cover v. Meyers, 75 Md., 406; Redington v. Woods, 45 Cal., 406; Aldrich v. Jackson, 5 R. I., 218.

In the transfer of commercial contracts on account of their general purpose the maxim of *caveat emptor* does not apply. Dumont v. Williamson, supra.

An indorser admits all prior indorsements to have been duly made. It is said the indorser warrants the title and genuineness of the paper he transfers, and that when sued he cannot deny the existence, legality, or validity of the contract which his indorsement put in circulation, for the purpose of defeating his own liability. Edwards on Bills and Notes, 289, 291; Fish v. First Nat. Bank, 42 Mich., 203.

This is strictly right. Parties dealing in such paper are not expected to be familiar with the signatures of the several indorsers. If satisfied that the last indorsement is genuine, they are not required to look beyond in the absence of such facts as would impute to them bad faith in case they did not. A person has no right to indorse paper, thereby making it negotiable, and offer it or permit it to be offered in the usual course of business, unless satisfied that the signatures previously appearing thereon are genuine. Mills v. Barney, 22 Cal., 240; Merriden v. Gallaudet, 120 N. Y., 298; 4 Ohio St., 628.

The holder of a bill or note has nothing to do with the preceding indorsements, and whether genuine or not his immediate indorser is liable to him. The last indorsement is, in fact, a

against the indorser, though the bill is a mere nullity in other respects. It is the indorser's business to see what he can

guaranty of the preceding indorsements, and admits the handwriting of drawer and prior indorser, although the bill be forged. Chitty on Bills, 197-8; 3 Kent Com., 60; 2 Salk., 127.

Forged Indorsement—Effect of.—If an indorsement is forged by one lawfully in possession of a commercial contract which cannot be transferred without indorsement, and he transfers it, so indorsed, to an innocent purchaser for value, the latter does not acquire any title thereto. Roach v. Woodall, 91 Tenn., 206; Foltier v. Schroeder, 19 La. Ann., 17; Roberts v. Tucker, 16 Q. B., 560.

The holder of a commercial contract payable to bearer or indorsed in blank may recover upon the same, providing he took it innocently, in the due course of trade, for a valuable consideration and before maturity, even though the transferer had stolen or found the same. If, however, it becomes necessary for the finder or the thief, in order to transfer the contract, to forge the indorsement of the original parties, then the indorsee takes no title whatever against the original parties. Story on Promissory Notes, 381-383; Roach v. Woodall, *supra*; Miller v. Race.

The original parties, however, to the contract may be estopped in certain cases from setting up that the indorsement was a forgery. Benjamin's Chalmers B. & N., 92.

Effect of Indorsement After Maturity.—Liability of the Indorser.—When a negotiable contract is indorsed after maturity, presentment and demand must be made within a reasonable time, and notice, in case acceptance or payment is refused, must be given to the indorser in order to charge him. The indorser cannot be held liable without presentment, demand and notice, unless these conditions are excused or waived. *Indorsing a commercial contract after maturity is equivalent to making a new contract payable on demand.* Dan. on Negot. Inst., 611, Beer v. Clifton, 98 Cal., 323; Goodwin v. Davenport, 47 Me., 112; Graul v. Strutzel, 53 Iowa, 712; Bassenhorst v. Wilby, 45 Ohio St., 336.

There is no precise time where a note payable on demand is deemed to be dishonored. As a general rule it is due within a reasonable time after its date, and what is a reasonable time is a question of fact. Goodwin v. Davenport, *supra*; Field v. Nickerson, 13 Mass., 131; Leavitt v. Putman, 53 Am. D., 322.

In Vermont the indorsee must prove demand and notice within sixty days of the indorsement to him in order to charge his indorser. Verder v. Verder, 63 Vt., 38.

In Michigan, a commercial contract payable on demand is payable at once and without demand, so that the statute of limitations begins to run from its delivery. Palmer v. Palmer, 36 Mich., 487; In re. King's Estate, 94 Mich., 411, 425; Fenno v.

make of the bill, but he, by his indorsement, is certainly liable to the indorsee.¹

Gay, 146 Mass., 118; McMullen v. Rafferty, 89 N. Y., 456.

The fact that a commercial contract has matured does not destroy its negotiability. Bassenhorst v. Wilby, 45 Ohio St., 333; 13 N. E. R., 75; Leavitt v. Putman, 3 N. Y., 494.

¹ So it has since been determined, that in action against indorser, it is not necessary to prove any indorsement on the bill prior to that of the defendant. Critchlow v. Parry, 1 Campb., 182. It had long before been decided, that in an action against the indorser, the handwriting of the drawer need not be proved. Lambert v. Pack, 1 Salk., 127; Lambert v. Oakes, S. C., 1 Ld. Raym., 443.

The present was one of the numerous cases which arose in the bankruptcies of Livesay & Co. and Gibson & Co., a succinct account of which will be found in the note to the case of Bennett v. Farnell, 2 Campb., 130, 180.

CHAPTER X.

Warrants or Admissions of an Indorser "Without Recourse."

SECTION 50.

AN INDORSER "WITHOUT RECOURSE" WARRANTS, OR ADMITS: (1) THAT HE IS A LAWFUL HOLDER OF THE CONTRACT; (2) THAT HE HAS A JUST AND LAWFUL TITLE TO THE SAME; (3) THAT THE CONTRACT IS IN EVERY WAY A VALID, SUBSISTING OBLIGATION; (4) THAT HE HAS A RIGHT TO TRANSFER IT.

DUMONT *v.* WILLIAMSON.¹

IN THE SUPREME COURT OF OHIO, DEC., 1869.

[*Reported in 18 Ohio St., 515; 5 Am. Law Reg. (N. S.), 330; 98 Am. Dec., 186.*]

The original action in this case was brought by the plaintiff in error, who states in his petition "that Henry Essman, on the 12th of May, 1860, at Cincinnati, made his promissory note in writing of that date, and thereby promised to pay to the order of William Wolff five hundred dollars, for value received, in four months after the date thereof, and which said promissory note purports to be indorsed on the back thereof by Wm. Wolff, which said note afterward came to the

¹ This case is cited in Benjamin's Chalmers Bills, Notes and Checks, 129, 222; Tiedeman on Commercial Paper, 260; Daniel on Negotiable Instruments, 670; Norton on Bills and Notes, 119, 167; Wood's Byles on Bills and Notes, 256. See also *Watson v. Chesire*, 18 Iowa, 202; 87 Am. D., 382; *Goupy v. Harden*, 7 Taunton, 159, 163; 2 Marsh, 454; *Gurney v. Wormsley*, 28 Eng. L. & Eq., 256; 4 Ell. & Bl., 132; *Gompertz v. Bartlett*, 24 Eng. L. & Eq., 156; *Baxter v. Duren*, 29 Me., 434; *Terry v. Bissel*, 26 Conn., 23. Judge Redfield's review of the decision of the court below in this case, vol. 5, p. 356, April number 5 of American Law Register; *Wheeler v. Miller, et al.*, 2 Handy, 149; *Ellis and Morton v. O. L. Ins. & Tr. Co.*, 4 Ohio St., 628.

hands of the defendant, who afterward then and there indorsed and delivered the same to the plaintiff, but without recourse on him. The plaintiff avers that the defendant did thereby warrant that the indorsement on the back thereof was the signature of William Wolff, and was made by him, whereas in truth and in fact said signature on the back of said note was not made by said William Wolff, but was and is a forgery, and by reason thereof said note was wholly worthless, and of no value, the said Henry Essman, the maker thereof, being wholly insolvent."

The petition proceeds to allege due demand and notice of non-payment at maturity, and asks judgment for the amount of the note, with interest.

A copy of the note is attached to the petition, which, with the indorsement thereon, corresponds with the statements of the petition.

To this petition the defendant demurred, and the case was thereupon reserved from special term for the opinion of the judges in general term upon the questions of law arising on the demurrer. By the judgment of the court in general term the demurrer was sustained, and the plaintiff not desiring to amend his petition, it was thereupon dismissed, and judgment rendered against plaintiff for costs.

The plaintiff here asks a reversal of this judgment on the ground of error in the Superior Court in sustaining the demurrer to his petition.

There is no statement in the petition of the circumstances under which the note in this case was transferred to the plaintiff, or the consideration paid therefor, but it is to be presumed that it was so transferred for a valuable consideration. If the fact be otherwise, this is a matter of defense, to be set up by answer.

There is no averment of fraud, or that the defendant had knowledge at the time of the transfer, of any defect in the note, which he concealed. The question therefore arises, whether upon the sale and transfer of a promissory note by indorsement, "without recourse," the vendor impliedly warrants that the signatures of the prior parties whose names appear thereon are genuine.

Whilst the words "without recourse," accompanying an indorsement, clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity, upon due demand, or even if all the parties to the paper should prove to be wholly insolvent, we think they can not be construed as importing more than this. At least they do not divest such indorser of his character as a vendor of the note, nor exempt him from the liabilities arising from a sale and transfer by delivery, where the note is capable of being thus transferred. In such case, then, is there no implied warranty on the part of the vendor that the note is not forged? That it is in fact what it purports on its face to be?

On this question the language of the text-books, in this country at least, is nearly, if not quite, uniform.

The Contract of a Transferrer, Simply, of a Commercial Contract.—Justice Story, in his Commentary on Promissory Notes,¹ speaking of the liabilities of a party who transfers a note by delivery only, says: "*In the first place he warrants by implication, unless otherwise agreed, that he is a lawful holder, and has a just and valid title to the instrument, and a right to transfer it by delivery; for this is implied as an obligation of good faith. In the next place, he warrants, in like manner, that the instrument is genuine, and not forged or fictitious.*" To this the editor of the fourth edition of the work, published in 1856, adds in brackets: ["that it is of the kind and description it purports on its face to be; unless where the note is sold, as other goods and effects, by delivery merely, without indorsement, in which case it has been decided that the law respecting the sale of goods is applicable, and that there is no implied warranty;"] referring in the notes to the cases of *Baxter v. Duren*,² *Ellis v. Wild*,³ and other authorities, also to conflicting decisions. This new matter was added to the text after Justice Story's death, as is shown by the brackets, and was evidently intended only as a statement of the authorities bearing on the question. The excep-

¹ § 118.

² 29 Maine R., 434.

³ 6 Mass. R., 321.

tion stated to the general rule as laid down by Judge Story can not, therefore, claim the sanction of his name.

The law is similarly stated in Parson on Notes and Bills,¹ where it is said to be "well settled that the vendor without indorsement [the transferrer] *warrants that the paper is of the kind and description that it purports to be.*" In a note on page 38, the case of Baxter v. Duren, *supra*, is referred to, where it was held that one who sells and transfers a promissory note by delivery is not liable on an implied warranty of its genuineness, *if he sold the same as property*, and not in payment of a debt previously existing or then created, and if he did not know of the forgery. But it was said in that case that if the note was transferred by delivery merely, in payment of a debt due, or for goods then purchased, or by way of discount for money then loaned, there would in such case be an implied warranty of the genuineness of the paper. "But," adds the learned author, "this distinction does not seem to be well founded." And again, at page 589 of the same volume, the principle is broadly stated "*that any transferrer of a note or bill transferable by delivery, warrants that it is no forgery.*" If it turns out that the name of one of the parties is forged, and the bill becomes valueless, the vendor, though no party to the bill, *becomes liable to the vendee as upon a failure of consideration.*" He then proceeds to state, without further comment, the distinction which was taken in the case of Baxter v. Duren, *supra*, and of which has previously disapproved.

So, in Edwards on Bills and Promissory Notes, page 291, it is said: "The party assuming to transfer a negotiable instrument thereby asserts it to be genuine, and is bound to make his assertion good." And on page 289: "Though the indorser transfers the note upon condition that it is to be collected at the risk of the indorsee, he is nevertheless responsible if the note proves to be a forgery."²

In England, it seems to be well settled, by the latest decisions on the subject, that the vendor of a bill of exchange

¹ Vol. 2, pages 37, 39.

² Shaver v. Ehle, 16 Johns. R., 201, and 20 N. Y. R., 226.

is responsible for its genuineness. Thus, in *Gompertz v. Bartlett*, decided in 1853, it was held by the Court of Queen's Bench that the vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be.¹ And in *Gurney and others v. Womersley*,² decided in 1854 by the same court, it was held that the *vendor* of a bill of exchange, though no party to the bill, *is responsible for its genuineness*; and if it turns out that the name of one of the parties is forged, and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. Both these cases were decided on the same principle which is applied in sales of personal property generally, that the vendor impliedly warrants that the article sold is of the kind and description which it imports and is understood by the parties to be.

In the case of *Baxter v. Duren*,³ *supra*, it was held that one who sells a promissory note, by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise to refund the money received therefor, if he sold the same as property, and not in payment of a precedent debt, and did not know of the forgery.

The same doctrine was held in the case of *Ellis v. Wild*,⁴ where the same distinction was made between the sale of the note and its transfer in payment of a debt. But the doctrine is no longer maintained in that commonwealth.⁵ In the last of these cases, *Ellis v. Wild* and *Baxter v. Duren* are both considered, and, for what seems to us good reasons, disapproved; and it is held that there is no valid reason for the distinction taken in those cases.

In *Aldrich v. Jackson*,⁶ the doctrine is expressly stated

¹ 24 Eng. L. and E. Rep., 156; 23 L. J. Ex., 65; see also *Challis v. McCrum*, 22 Kan., 157; *Bell v. Dagg*, 60 N. Y., 528; *Bell v. Cafferty*, 21 Ind., 411.

² 24 L. J., Q. B., 46.

³ 29 Me., 434.

⁴ 6 Mass., 321.

⁵ *Cabot Bank v. Morton*, 4 Gray, 156; *Lobdell v. Baker*, 1 Met., 193; *Merriam v. Wolcott*, 3 Allen, 258.

⁶ 5 R. I., 218.

that "the vendor of a bill or note, by the very act of sale, impliedly warrants the genuineness of the signatures of the previous parties to it."

The same doctrine is held in *Terry v. Bissel*,¹ and in *Thrall v. Newell*.²

And the principle upon which these decisions rest has its foundation, as we think, in reason and justice.

¹ 26 Conn., 23.

² 19 Vt., 202.

An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse," does away with this conditional liability. It leave the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor, and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery. (*Hannum v. Richardson*, 48 Vt., 508.)

The Warranties of Tranferrer.—Independent of any matter of indorsement, what implied warranty is there in the transfer by delivery simply of a promissory note? Two things are clear under the authorities: 1st, that there is an implied warranty of the genuineness of the signatures; and 2nd, that there is no warranty of the solvency of the parties. It is unnecessary to more than refer to a few of the authorities upon these propositions: *Byles on Bills*, pp. 123, 125, and cases in notes; *Jones v. Ryde*, 5 Taunt., 488; *Gurney v. Womersley*, 4 El. & Bl., 132; *Gompertz v. Bartlett*, 24 Eng. Law & Eq., 156; *Terry v. Bissell*, 26 Conn., 23; *Merriam v. Wolcott*, 3 Allen, 259; *Aldrich v. Jackson*, 5 R. I., 218; *Lobdell v. Baker*, 3 Metc., 469; 1 Addison on Cont., p. 152; *Ellis v. Wild*, 6 Mass., 321; *Eagle Bank v. Smith*, 5 Conn., 71; *Shaver v. Ehle*, 16 Johns., 201; *Dumont v. Williamson*, 18 Ohio St., 515; 2 *Parsons on Notes and Bills*, ch. 2, § 2.

A reference to some of the leading cases will throw light upon this question.

In *Thrall v. Newell*, 19 Vt., 203, it appeared that one of the makers of a note was insane. The vendor made a written assignment, in which was a description of the note, and the court construed this as an express warranty that the instrument was the legal obligation of the apparent makers, and one of them being incapable of contracting, gave judgment against the vendor on account of this breach for the amount received by him. While the judgment of the court is rested upon the fact of an express warranty, the judge who writes the opinion expresses his individual conviction that the same result would follow on a mere transfer without any express warranty, and quotes approvingly an extract from

In the sale what purports to be a promissory note, it is not the material substance of the paper and ink for which the consideration is understood by the parties to be paid, but it is the *chose in action* of which the note purports to be the evidence, that is the real subject of negotiation and transfer. But if the note is forged, if no such chose in action exists, if the vendor neither owns nor parts with anything of the kind,

Rand's edition of Long on Sales, that "there is an implied warranty in every sale that the thing sold is that for which it is sold."

In *Lobdell v. Baker*, 3 Metc., 469, it appeared that the owner of a note procured the indorsement of a minor, and then put the paper in circulation. He was held liable to a subsequent holder. Ch. J. Shaw, delivering the opinion of the court, said:

"Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a right to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In *Hannum v. Richardson*, 48 Vt., 508, a note was given for liquor sold in violation of law, and was by statute void. Defendant knowing its invalidity, transferred it by an indorsement without recourse, and was held liable to his vendee.

In *Delaware Bank v. Jarvis*, 20 N. Y., 226, a usurious note was sold, and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers of the note. In the opinion, Mr. Justice Comstock uses this language:

"The authorities state the doctrine in general terms that the vendor of a chose in action, in the absence of express stipulation, impliedly warrants its legal soundness and validity. In peculiar circumstances and relations, the law may not impute to him an engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case, the defendant held a promissory note which was void, because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattained so far at least as he had been connected with its origin."

In *Young v. Cole*, 3 Bingham (N. C.), 724, certain bonds were sold as Guatemala bonds, which turned out afterward to be lacking the requisite seal, and the vendor, though ignorant of the de-

it is difficult to see any just ground upon which he can be allowed to retain the purchase money. He has undertaken to sell what he did not own, and that which in fact has no existence. The maxim of *caveat emptor* is inapplicable to such a case.

The present case, however, is much stronger. It is not a case of sale by delivery merely, but by indorsement, qualified, it is true, so as to exclude the liabilities consequent

fect and innocent of wrong, was compelled to refund the money. The thing in fact sold was not the thing supposed and intended to be sold.

In *Gompertz v. Bartlett*, 24 Eng. Law and Eq., 156, the plaintiff discounted for the defendant an unstamped bill, purporting on its face to have been a foreign bill, drawn at Sierra Leone and accepted in London, but which was in fact drawn in London. If actually a foreign bill, it required no stamp, and was valid; but being an inland bill, it required a stamp to make it a valid bill in a court of law. The acceptance was genuine, and the acceptor had previously paid similar bills. But the acceptor becoming bankrupt, the commissioner refused to allow it against his estate because not stamped. Thereupon the plaintiff, who had sold the bill, and had been compelled to take it up, brought his action to recover the price he had paid for it, and the action was sustained. Ld. Campbell, before whom the case had been tried, and who then held adversely to the plaintiff, said:

“I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground: that the article sold did not answer the description under which it was sold. If it had been a foreign bill, and there had been any secret defect, the risk would have been that of the purchaser; but here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purporting to be drawn at Sierra Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description.”

In *Ticonic Bank v. Smiley*, 27 Me., 225, an overdue note was transferred with this indorsement, “Indorser not holden;” yet it was decided that the indorser was liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it of which the note gave no indication and the vendor no information.

In *Snyder v. Reno*, 38 Iowa, 329, it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: “We have no doubt that there is an implied warranty of the transferrer that there is no

thereon under the commercial law. Still, the defendant is a party to the note, he has sold and transferred it as such, and he is bound to make his representation good. On this question we know of no conflict in the authorities.

The judgment of the court below must then be reversed, the demurrer to the plaintiff's petition overruled, and a *procedo* awarded.

defect in the instrument, as well as that the signature of the maker is genuine." See also, *Blethen v. Lovering*, 58 Me., 437; *Ogden v. Blydenburgh*, 1 Hilton, 182; *Fake v. Smith*, 2 Abb. (N. Y.), App., 76; 2 *Parsons on Notes and Bills*, ch. 2, § 2, and cases in notes; *Terry v. Bissell*, 26 Conn., 23; 1 *Daniel on Neg. Instruments*, § 670.

The Contract of an Indorser "Without Recourse."—"When the indorsement is *without recourse*, the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse but who is never less liable if he draws upon a fictitious party, or one without funds. And, therefore, the holder may recover against the indorser *without recourse*, (1) if any of the prior signatures were not genuine; or, (2) if the note was invalid between the original parties, because of the want, or illegality of, the consideration; or, (3) if any prior party was incompetent; or, (4) the indorser was without title." For a further discussion of this rule see *Watson v. Chesire*, 18 Iowa, 202; *Hailey v. Falconer*, 32 Ala., 536; *Rice v. Stearns*, 3 Mass., 225; *Ticonic Bank v. Smiley*, 27 Me., 225.

If an indorsement is intended to be "without recourse" that fact should be indicated; for it is a well settled rule of law that an unqualified indorsement, in full or in blank, cannot be varied by parol as against a subsequent *bona fide* holder. *Daniel on Negotiable Instruments*, 699, 719; *Dale v. Gear*, 38 Conn., 15; 9 Am. Dec., 353; *Hill v. Shields*, 81 N. C., 250; 31 Am. Rep., 499; *Martin v. Cole*, 104 U. S., 30; *Charles v. Denis*, 42 Wis., 56; 24 Am. Rep., 383; *Lee v. Pile*, 37 Ind., 107, 110; *Rodney v. Wilson*, 67 Mo., 123.

An Indorsement "Without Recourse" Does not Impair the Negotiable Quality of Commercial Contracts.—An indorsement "without recourse" does not impair the negotiable quality of commercial contracts. Neither does it put a subsequent purchaser upon inquiry concerning defenses which might be set up by prior parties. *Borden v. Clark*, 26 Mich., 410; *Rice v. Stearns*, 3 Mass., 225; *Stevenson v. O'Neal*, 71 Ill., 314; *Bisbing v. Graham*, 14 Pa. St., 14; *Gompertz v. Bartlett*, 24 Eng. L. & Eq., 156.

CHAPTER XI.

Warranties or Admissions of a Transferrer of a Commercial Contract Without Indorsement.

SECTION 51.

THE TRANSFERRER OF A COMMERCIAL CONTRACT, PAYABLE TO BEARER, WITHOUT INDORSEMENT, IMPLIEDLY WARRANTS OR ADMITS: (1) THAT HE IS A LAWFUL HOLDER OF THE CONTRACT; (2) THAT HE HAS A JUST AND LEGAL TITLE TO THE SAME; (3) THAT THE CONTRACT IS IN EVERY WAY A VALID, SUBSISTING OBLIGATION; (4) THAT HE HAS A RIGHT TO TRANSFER IT; (5) THAT IT IS THE KIND AND DESCRIPTION OF A CONTRACT THAT IT PURPORTS TO BE.

GOMPERTZ *v.* BARTLETT.¹

IN THE COURT OF QUEEN'S BENCH, NOV. 14, 1853.

[*Reported in 24 English Law and Equity, 156; 23 Law J. Rep. (N. S.), Q. B., 65; 18 Jur., 266; 2 Ellis & Blackburn, 849.*]

The Form of Action.—Action for money payable by the defendant to the plaintiff, and for money received by the defendant for the use of the plaintiff.

Plea of the general issue.

On the trial, before Ld. Campbell, C. J., at the sittings in London after Trinity term last, it appeared that the plaintiff and the defendant had for the previous six or eight months considerable dealings together in respect of the discounting of bills of exchange; and in January last the defendant produced to the plaintiff, for the purpose of being discounted, an unstamped bill, purporting on the face of it to have been a foreign bill drawn at Sierra Leone, and accepted in London, but

¹This case is cited in Wood's Byles on Bills and Notes, 268, 568; Benjamin's Chalmers Bills, Notes and Checks, 227. See also Webb v. O'Dell, 49 N. Y., 583; Bell v. Dagg, 60 N. Y., 528; Murray v. Judah, 6 Cowen, 483; Brown v. McNamara, 20 N. Y., 287.

which it appeared was, in fact, drawn in London. The defendant then stated to the plaintiff that he believed the bill to be perfectly good, and that it would be paid at maturity; that he would not put his own name upon it, but that the plaintiff might take the bill and make inquiries about it and that if he approved of it he, the defendant, would pay a liberal discount upon its being taken without his name. The plaintiff took the bill, and upon inquiry was informed that the parties to it were respectable, and he thereupon paid the defendant the amount of the bill, less 85% discount. The plaintiff afterwards indorsed the bill to a person named Rogers, for the full amount, less 5% per cent. discount. The bill was afterwards dishonored, the acceptor becoming bankrupt, the plaintiff was compelled to repay the amount he had received from Rogers. Bills of the same kind had before been paid by the acceptor, and an endeavor was made to prove under the bankruptcy of the acceptor for the amount of the bill, but the commissioner refused to allow it, as the bill was not stamped. Upon these facts, the learned judge was of opinion that the action could not be maintained, and the plaintiff was non-suited, leave being reserved to move to set aside the non-suit, and to enter a verdict for the plaintiff for 815%.

The Claim of the Plaintiff.—The plaintiff contended that the bill was a perfect bill of exchange, though unstamped. The acceptor was in the habit of paying bills such as these. The mere fact that his bankruptcy prevented him paying it, cannot entitle the plaintiff to recover back the money he paid for it. There has been no failure of consideration.

There is no implied warranty that the bill was drawn at any particular place, or that it did not require a stamp, or that it was more a bill of exchange than it purported to be on its face, or that it was of a merchantable character. In *Parkinson v. Lee*,¹ it was held that there was no warranty that hops sold by sample were of a merchantable quality, and there was no more warranty of the bill in this case. The principle of *caveat emptor* clearly applies.² Here the plaintiff had the bill

¹ 2 East, 314.

² Co. Lit., 102, a. *Bree v. Holbech*, Dougl., 630; *Chandelor v. Lopus*, Cro. Jac., 4, and *Taylor v. Bullen*, 5 Exch. Rep., 779.

to inspect. He took it away, and made such inquiries about it as he pleased. He had every power of ascertaining the truth.

[Wightman, J., put this question: "How can you distinguish this from the case of a forged bill? There is an implied warranty that the instrument is genuine, though there is none that the parties are solvent." Byles on Bills, 266.]

It has never been held as a part of a definition of a bill of exchange that it should be drawn upon a proper stamp. This bill is a genuine bill and might have been enforced abroad. If a horse sold without a warranty die, the day after the purchase, of a latent defect existing before the sale, the loss falls on the purchaser. *Jones v. Ryde*¹ is distinguishable, for a forged bill is no bill at all. *Chapman v. Speller*² is much in point to show that the plaintiff cannot recover this money back; this is like the case of *Baglehole v. Walters*,³ and *Pickering v. Dowson*.⁴ There was no representation whatever made at the sale of the bill, which distinguishes this case from *Bridge v. Wain*.⁵ At most, it was but a sale of what purported to be a foreign bill. *Wilson v. Vysar*.⁶

The remedy here, if at all, was by a special action, and the plaintiff cannot sue for the whole price, upon the ground of failure of consideration. *Kempson v. Saunders*⁷ may be relied on by the other side, but that case rests upon the ground that the shares sold were not saleable at all.

The Claim of the Defendant.—The question is, whether a vendor of that which purports to be a valid security is not liable if it turns out upon some latent defect to be invalid. The authorities that have been cited do not apply. Here the bill of exchange sold was not of the description which it purported to be when sold. It does not confer the rights and powers which it purported to give. The sale and purchase

¹ 5 Taunt., 488.

² 14 Q. B. Rep., 621.

³ 3 Camp., 154.

⁴ 4 Taunt., 779.

⁵ 1 Stark, 504.

⁶ 4 Taunt., 288.

⁷ 4 Bing., 5.

was of a bill of exchange of value and capable of being enforced. In *Young v. Cole*,¹ where bonds were sold as Guatemala bonds, and it turned out that they had not been sealed at the time required to render the estate liable, it was held that they could not be considered as Guatemala bonds, and that the vendor was bound to refund the purchase money. So, here, in point of law, this cannot be considered as a bill of exchange. It purported to be a foreign bill, and apparently did not require a stamp, and the defendant impliedly represented it to be a foreign bill.

In Addison on Contracts,² the law is correctly stated to be, that if a man goes into the money market with a bill or note and gets it discounted, and it is not the bill or note of the parties whose names appear upon it, the money received in exchange for it cannot lawfully be retained, and that declining to indorse the bill does not rid the party negotiating it from the liability which attaches to him for putting off an instrument as of a certain description which turns out not to be such as it is represented. The case of *Jones v. Ryde*³ is not distinguishable from the present, and the decisions on the cases of forged signatures apply strongly to this case.

Decision.—*Ld. Campbell, C. J.*, said, “At the trial I entertained an opinion adverse to the plaintiff. I was struck with the consideration that this was the case of a mere sale, and that the vendor had title in the thing sold, and knew nothing of any secret defect when he sold. And it was difficult to say that the bill was of no value at the time of the sale, because at that time there was no strong reason for supposing that it would have been paid if the acceptor had not been insolvent, and even now payment might perhaps be enforced in a foreign country. I then thought that the rule of *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and *upon this ground, that the article sold did not answer the description under which it was sold*. If it had been a foreign bill and there had been any secret defect, the risk would have

¹ 3 Bing., (N. C.), 724.

² Vol. 1, p. 152.

³ 5 Taunt., 488.

been that of the purchaser; but here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierra Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description. It is not a foreign bill, but was drawn in London, and payment of it could not be enforced here. This is not the case of a sale of goods answering the description of the goods sold, and a secret defect in the goods; but it is the case of a thing which is not what it professed to be when sold, and upon this ground I think the money must be taken to have been paid upon a mistake of fact, the bill not answering the description of that sold.

The passage quoted from Addison on Contracts very clearly, I think, lays down the law on this subject, and both *Jones v. Ryde*¹ and *Young v. Cole*² are authorities in support

¹ 5 Taunt., 488.

² 3 Bing. (N. C.), 724.

Warranties or Admissions of a Transferrer.—While the transferrer cannot be held liable to a subsequent transferee either upon the instrument or the consideration, he may be liable upon his warranties or admissions. The transferrer, while he does not warrant the solvency of the prior parties, he does warrant:

1. That the contract, in every respect, is a genuine one;
2. That he has a good title to the same;
3. That the parties to the instrument were competent to contract;
4. That the contract is not forged or fictitious;
5. That the contract is just what it purports to be. *Merriam v. Wolcott*, 3 Allen, 258 (1861); *Gurney v. Womersley*, 4 El. & Bl., 123; *Shaver v. Eale*, 16 John., 201; *Bell v. Dagg*, 60 N. Y., 528; *Wilder v. Cowles*, 100 Mass., 487; *Swanzey v. Parker*, 50 Pa. St., 441; *Lobdell v. Baker*, 3 Metcalf, 469 (1842); *Bayard v. Shunk*, 1 W. & S. (Pa.), 92; *Erwin v. Down*, 15 N. Y., 575; *Tiedeman on Com. Paper*, 244; *Thrall v. Baker*, 4 Metcalf, 193.

Some cases hold, however, that where a commercial contract is transferred or exchanged without indorsement, that no such warranties or admissions are implied. *Batzer v. Ruren*, 29 Me., 434; *Fisher v. Rieman*, 12 Md., 497; *Ellis v. Wild*, 6 Mass., 321.

It has been held that the transferrer also warrants that he has no knowledge at the time of the transfer of any defenses or facts which will defeat the enforcement of the contract. The suppression of the truth is a fraud and he is liable. *Wood's Byles on B. & N.*, 269; *Camidge v. Allenby*, 6 B. & C., 373 (1827); 60 E. C.

of the action. In principle the case is the same as if the vendor had professed to sell a bar of gold, which turned out to be mere dross colored and disguised. I am, therefore, of opinion, that the law implies to a promise on the part of the vendor

L. R.; Fenn v. Harrison, 3 T. R., 759 (1790); Delaware Bk. v. Jarvis, 20 N. Y., 228 (1859); Bridge v. Batchelder, 9 Allen, 394 (1864).

The rule as to what defenses may be interposed against the holder of negotiable contracts applies to a transferee. Equities may be interposed against him if he is not a *bona fide* holder.

Transfer by Delivery Simply.—When a commercial contract is payable to bearer it may be transferred so that the holder or transferee would take both the equitable and legal title, by delivery simply without indorsement. This is true of a commercial contract payable to order, also, after it has been once indorsed in blank, for the reason that a note payable to order and indorsed in blank is equivalent to a commercial contract payable to bearer. Lamb v. Matthews, 41 Vt., 42 (1868); Holcomb v. Beach, 112 Mass., 450; Curtis v. Sprague, 51 Cal., 239 (1876); O’Keefe v. First Nat. Bk., 49 Kan., 347; Russ v. Smith, 19 Tex., 171; 70 Am. Dec., 327.

The transferrer by a mere delivery of a commercial contract, payable to bearer without indorsement, incurs no liability *on the instrument* to the transferee; that is, he is not liable upon the consideration for the transfer. He is only liable upon his warranties or admissions. The transferee can never look to the transferrer for payment, if the contract is a valid subsisting one. Wood’s Byles on B. & N., 265; Benjamin’s Chalmers on B. & N., 226; Roberts v. Haskill, 20 Ill., 59, where Canton, C. J., says, “By receiving and passing the note while under a blank indorsement, and without putting his name to it, he (transferrer) assumed no responsibility in relation to it. The moment he parted with it he became as much a stranger to it as if he had never held it. Had the party to whom he passed it wished him to assume any responsibility in relation to it, he should have required his indorsement upon it. By taking it without such indorsement he waived any such guaranty and agreed to take it upon the sole responsibility of the names already on the note.”

In case the contract is payable to a particular person or to his order, and is transferred without indorsement, the transferee takes but an equitable title and has the rights of an assignee only.

In Illinois, however, it is held that where a negotiable contract is payable to a particular person or bearer it cannot be transferred by mere delivery, so as to vest the legal title in the transferee; so that the word “bearer” in such a note is surplusage in that state. Hilborn v. Artus, 3 Scam., 344; Roosa v. Crist, 17 Ill., 450.

to repay the purchase money, and that the action is well brought.

Coleridge, J.—This is the case of a mere sale, and where there is a sale of goods without a warranty the vendor is not

Indorsement of a Non-Negotiable Instrument.—An indorsement upon a non-negotiable contract does no more than to transfer the equitable interest therein with the right to recover the money due thereon. It amounts to a mere assignment of the contract. It is not an unusual way of transferring non-negotiable contracts for the holder to write his name across the back thereof, but such act imports no legal liability on the part of the indorser to pay the amount of the claim in case of failure by the debtor. To hold otherwise would be giving to the apparent indorsement the same character and effect of an indorsement and to subject the maker of it to the liability of an indorser of a commercial contract. *Story v. Lamb*, 62 Mich., 525.

Indorsement—Statute of Limitations.—At common law when a cause of action once accrues, an action might be brought upon it at any time subsequently. The action was never barred by reason of a mere lapse of time; and it was not until after the middle of the thirteenth century when by statute the time within which an action must be brought was limited. These statutes at first limited the time within which an action pertaining to real property should be brought. Early in the seventeenth century similar statutes were enacted applying to actions concerning personal property. Now all the states have statutes limiting the time within which actions may be brought. The statutes of limitation do not destroy the debt, they simply bar the remedy. In order for the defendant to secure the advantage of these statutes he must specially plead them. In some jurisdictions, however, under proper circumstances the advantages under the statutes of limitations may be taken by demurrer.

The statutory period within which an action must be brought commences to run from the time an action accrues. To illustrate: a commercial contract is nominally due upon the first day of the month, but if grace is allowed it is not legally due until the fourth day of the month, and no action can be brought upon the fourth, for the reason that the maker has the entire day in which to pay the same; therefore no action can be brought until the fifth, at which time the statute of limitations begins to run.

If the contract is payable on demand, the statute of limitations does not begin to run until a *demand* is made, but it does run from that time, for the reason that an action accrues immediately. If the contract is payable a certain time after demand, then of course that period must elapse before the statutes begin to run. In some jurisdictions, however, where the commercial contract is payable on demand it is payable at once and without demand;

bound to see that the thing he sells possesses either the quality or value supposed at the time of the sale. But a vendee is entitled to have a thing of the kind and description which the thing professes to be at the time of the sale. Here, in

and in such jurisdictions the statutes run from its delivery, for the reason that an action may be brought at once without a demand. *Palmer v. Palmer*, 36 Mich., 487; *in re. King's estate*, 94 Mich., 411, 425; 54 N. W. R., 178; *Hitchings v. Edmands*, 113 Mass., 338; *Fenno v. Gay*, 146 Mass., 118; 15 N. D. R., 87; *McMullen v. Rafferty*, 89 N. Y., 456; *Jones v. Nicholl*, 82 Cal., 32; *Massie v. Byrd*, 87 Ala., 681; and this is true whether the note be payable with or without interest. *Wenman v. The Mohawk Co.*, 13 Wend., 267; *Wheeler v. Warner*, 47 N. Y., 519; 7 Am. R., 478.

If the contract is payable at sight it becomes due at sight, and the statute of limitations runs from that date. If the contract becomes due upon the happening of some event, the statute of limitations begins to run from such event. If the contract is indorsed or transferred after maturity, the indorsement is equivalent to the drawing of a new contract payable on demand, and an action may be brought immediately thereon. If there is a breach in any of the warranties made by an indorser, an action may be brought against him immediately, even before the maturity of the principal contract. *Blethen v. Lovering*, 58 Me., 437 (1870); *Turnbull v. Bowyer*, 40 N. Y., 456 (1869); *Graham v. Robertson*, 79 Ga., 72.

If an action is barred by reason of the statute of limitations, no action can be maintained upon the collateral security given for the payment of the debt. When the action on the principal contract is barred an action on the security is also barred. *Schmucker v. Sibert*, 18 Kan., 104; *Grattan v. Wiggins*, 23 Cal., 16; *Wood v. Goodfellow*, 43 Cal., 185; *Pollock v. Maison*, 41 Ill., 516; *Medley v. Elliott*, 62 Ill., 532; *Day v. Baldwin*, 34 Ia., 380.

Indorsement After Payment—Effect of.—Maturity of a commercial contract does not destroy its negotiability; but whoever takes it after maturity, as a general rule, takes it with notice of existing equities. Therefore, if the holder of a negotiable contract should negotiate the same after maturity and after payment, he could not thereby render the makers liable thereon. He would be liable only upon the warranties of an indorser.

Payment Before Maturity—Liability of Maker.—A different condition would arise where the maker should pay a commercial contract before maturity and permit the payee to negotiate it thereafter before maturity. In such a case, if a contract should come into the hand of a *bona fide* holder, he (maker) might be called upon to pay the contract a second time. *Morley v. Culverwell*, 7 Mess. & W., 174.

Payment before maturity by the maker of a commercial con-

the absence of all fraud, both parties thought they were dealing about a foreign bill, which on the face of it this bill purported to be, and it turns out not to be a bill of that kind and description, and therefore [because it is unstamped it is] of no

tract to the holder thereof, if not followed by a surrender of the same, will not protect him. *Wheeler v. Guild*, 20 Pick., 545; *Miller v. Race*, 1 Burr., 452; *Kingman v. Pierce*, 17 Mass., 247; *Bleaden v. Charles*, 7 Bing., 246.

Indorsement—Mistake in.—A mistake in the indorsement will not necessarily render it void. If the name of the special indorsee is misspelled, he may indorse it by spelling his name properly. *Leonard v. Wilson*, 2 C. & M., 589; *Wood's Byles on B. & N.*, 152.

Indorser's Right to Fill Up a Blank Indorsement.—The holder of a commercial contract indorsed in blank can convert it into an indorsement in full in his own favor by superscribing the necessary words. He may also change the blank indorsement into one in full in the same way, making it payable to a stranger. In case there are several blank indorsements, the holder may fill up any one of them, making it an indorsement in full, or he may make his title through all of them. He may, in short, so long as he does not increase the liability of any of the parties to the instrument, change any or all blank indorsements to indorsements in full to himself or strangers. He may fill up a blank indorsement, by a superscription, with any contract consistent with the character of that indorsement. *Bank of Utica v. Smith*, 18 Johns., 230; *Mitchell v. Culver*, 7 Cowan, 336; *Cope v. Daniel*, 9 Dana (Ky.), 415 (1840); *Cole v. Cushing*, 8 Pick., 48; *Vincent v. Horlock*, 1 Camp., 442.

The Holder's Right to Strike Out an Indorsement.—The holder of a commercial contract upon which there are indorsements may strike out any or all of such indorsements which are not necessary to his title. If the contract is payable to bearer and there are several indorsements in blank, the holder may strike out all of them. By striking out an indorsement, if intentional, the indorser is thereby released from all liability. *Middleton v. Griffith*, 57 N. J. L., 442; 51 Am. St. R., 617, 619; *Mendelhall v. Banks*, 16 Ind., 284; *Parks v. Brown*, 16 Ill., 454; *Brett v. Marston*, 45 Me., 410.

These indorsements may be struck out at any time either before or during the trial. *Middleton v. Griffith*, supra; *Porter v. Cushings*, 19 Ill., 572.

The holder must not, however, strike out the indorsement through which he makes his title. If the indorsements are in blank and the instrument payable to bearer, as was said above, he may strike out all; if, however, it is payable to a particular person or order and is indorsed by him and several others in blank, he

value; and common justice requires that the vendee should not be bound, and that the purchase money should be recovered back.

Wightman, J.—I am of the same opinion, on the ground that the thing sold does not answer the description of that

may not strike out the indorsement of the original payee without changing the transfer by indorsement to an assignment, for the reason that he would not be able to make his title through the original payee or his order.

Transfer of Negotiable Contracts by Operation of Law.—While commercial contracts may be transferred by assignment, by indorsement and by delivery, they may also be transferred by operation of law. A transfer of a commercial contract by operation of law will occur in the following cases:

1. In the case of bankruptcy or assignment for the benefit of creditors, where all the property of the bankrupt or of the assignor passes to the assignee without an express assignment or indorsement;

2. In the case of the death of a payee or holder, his right and title passes to his personal representatives;

3. In the case of the death of one of the joint payees, the title vests at once in the survivors;

4. Where a note is transferred to a married woman, the title at once vests in the husband, unless otherwise provided for in the statutes under the married woman's acts. Norton on Bills and Notes (2d ed.), 191.

The Indorsement Must Not be Partial.—The law will not permit the parties to split their cause of action, therefore the holder of a commercial contract will not be permitted to indorse for a part of the amount; but in case a part of the amount has been paid, an indorsement may be made of the balance, which of course is not a violation of the rule. At common law a transfer of a part only of a commercial contract could not be recognized, and no action at law could be maintained on such a title by any of the parties. *Hawkins v. Cardy*, 1 *Ld. Raym.*, 360; *Heilbut v. Nevil*, 4 *L. R. C. P.*, 358; *Conover v. Earle*, 26 *Iowa*, 169; *Goldman v. Blum*, 58 *Tex.*, 636; *Lindsay v. Price*, 33 *Tex.*, 282.

But now by statute in many of the states the indorsee or assignee of a part of a demand may sue by making the indorser or assignor a party, either plaintiff or defendant. *Lapping v. Duffy*, 47 *Ind.*, 571; *Gorves v. Ruby*, 24 *Ind.*, 418; *Fordyce v. Nelson*, 91 *Ind.*, 448.

In the case of a partial assignment, the indorsee will have a lien upon the instrument to the extent of the indorsement. *Flint v. Flint*, 6 *Allen*, 36.

When May an Indorsement be Made?—The indorsement or transfer of a commercial contract may be made any time after

which the vendor professed to sell. On its face the bill purports to be a foreign bill of exchange not requiring a stamp. It turns out, however, that so far from answering the description of that for which it was sold, it was not a

its execution and delivery, either before or after maturity. Maturity does not destroy the negotiability of these contracts. *Leavitt v. Putman*, 3 N. Y., 494; *Scott v. First Nat. Bk.*, 71 Ind., 448.

But when a person takes a commercial contract after maturity, or with notice of its having been dishonored, he takes it subject to all the equities which might have been interposed against the party from whom he receives it. *Robinson v. Lyman*, 10 Conn., 30; *Lansing v. Gaine*, 2 Johns., 300. If, however, he takes it from one having a title freed from equities, then he gets the title of his indorser and may recover. *Kost v. Bender*, 25 Mich., 515. And this is true even though he had knowledge of the equities.

The Law of What Place Governs the Indorsement.—Commercial contracts, like common law contracts, in the absence of stipulations to the contrary, are governed according to the *lex loci*; and in case of indorsement, there is a presumption that it was made at the place where the contract was made. This presumption, however, may be rebutted by positive proof to the contrary. Unless otherwise stipulated, a contract of indorsement is controlled by the law of the place where made. There is some conflict of authority in the case where a contract is executed and delivered in one place to be performed in another, as to the laws of which place controls. It was held in the case of *Staples v. Nott*, upon a promissory note bearing date at Washington, D. C., and payable at a bank in Watertown, N. Y., that the plaintiffs was entitled to recover as upon a contract made under the government of the laws of the District of Columbia. 128 N. Y., 403; 28 N. E. Rep., 515; *Bank v. Low*, 81 N. Y., 566; *Sheldon v. Haxton*, 91 N. Y., 124.

In the case of *Alister v. Smith*, it was held that the laws, of the state where a negotiable contract is made, will fix the rate of interest that it is to draw. 17 Ill., 328.

Some of the courts have made a distinction between a case where the note was given for an original indebtedness or as a renewal note simply. *Staples v. Nott*, supra; 65 Am. D., 651; *Dugan v. Lewis*, 79 Tex., 246; 23 Am. St. R., 332; *New England Co. v. McLaughlin*, 87 Ga., 1; *Hanover Nat. Bk. v. Johnson*, 90 Ala., 549.

While Beck, C. J., in the case of *Bigelow v. Burnham*, says: "It is a well settled rule that the law of the place where a contract or a note by its terms is to be performed determines the question of its validity." 83 Iowa, 120; *Burrows v. Stryker*, 47 Iowa, 477; *Story on Conflict of Laws*, §§ 242, 280, 281; *Andrews v. Ponds*, 13 Peters, 65; *City of Aurora v. West*, 22 Ind., 88; 85 Am. D., 413; *Mason v. Dousay*, 35 Ill., 424; 85 Am. D., 368.

bill drawn at Sierra Leone, but an inland still requiring a stamp, and therefore not a valid bill in any court of law. I agree, that if an article sold and delivered without a warranty answers the description of that which at the time of sale it

The parties may, however, where a contract is executed in one place to be performed in another, stipulate as to the laws of which place shall control, and in that case their agreement will be carried out. *New England Co. v. McLaughlin*, *supra*.

It is a well recognized rule of law that a commercial contract must conform to the place where made as to the formality of its execution and the consideration necessary to its validity; the *lex loci* governs also in its interpretation, nature and effect. *Evans v. Anderson*, 78 Ill., 558; *King v. Sarria*, 69 N. Y., 24; *The Freeman's Bk. v. Ruckman*, 16 Gratt. (Va.), 126.

It is often difficult to determine whether a matter relates to the rights of the parties or to the remedy, and whether it is governed by the *lex loci* or the *lex fori*. *Leroux v. Brown*, 12 C. B., 801; 74 E. C. L. R., 801; *The Freeman's Bank v. Ruckman*, 16 Gratt., 126.

The Laws of What Place Govern Negotiable Contracts.—In the case of *Kilgore v. Dempsey*, it was held, where the maker of a commercial contract resided in Ohio, where the law, at the time, allowed the parties to contract for any rate of interest not exceeding ten per cent., and the payee resided in Pennsylvania, where six per cent. was a legal rate of interest, that on a loan of money made in Ohio the parties had a right to stipulate in the note for interest at ten per cent. per annum and to make the note payable in Pennsylvania, without thereby rendering a contract usurious. 25 Ohio St., 413; *Chapman v. Robertson*, 6 Paige, 627; *Peck v. Mayo*, 14 Vt., 33, where Redfield, J., in delivering the opinion in an action upon a contract executed and delivered at Montreal, Canada, and payable in New York, said, "If a contract be entered into in one place to be performed at another, and the rates of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus, by their own express contract, determine with reference to the law of which country that incident of the contract shall be recited." *Harvey v. Archbold*, 1 Ryan & Moody, 184; E. C. L. R., 412; *Dessau v. Humphreys*, 20 Martin, 1; *Andrews v. Pond*, 13 Peters, 65; *Ekins v. The East India Co.*, 1 P. Wms., 395.

If, however, the contract is entered into in one country to be performed in another having established a lower rate of interest than the former, and the contract stipulates interest generally, it has always been held that the rate of interest recoverable was that of the place of performance only. *Robinson v. Bland*, 2 Burrow, 1017; *Fanning v. Cousequa*, 17 Johns., 511; *Scofield v. Day*, 20 Johns., 102.

professed to be, and the vendor professed to sell, the rule of *caveat emptor* applies. Young v. Cole¹ and Jones v. Ryde² are both authorities in support of the action; and Jones v. Ryde is more especially an authority in point.

Rule absolute.

¹ 3 Bing. (N. C.), 724; 4 Scott, 495.

² 5 Taunt., 488; 1 Marsh., 157.

CHAPTER XII.

Protest.

SECTION 52.

THE "CERTIFICATE OF PROTEST" SHOULD SHOW:—(1) A COPY OF THE INSTRUMENT OR SHOULD SET IT OUT ACCORDING TO ITS LEGAL EFFECT; (2) THAT PRESENTMENT AND DEMAND WERE MADE; (3) THE TIME AND PLACE OF PRESENTMENT AND DEMAND; (4) THE PARTIES BY AND TO WHOM PRESENTMENT AND DEMAND WERE MADE; (5) THE ANSWER, IF ANY, GIVEN TO THE DEMAND; OR THAT NO ANSWER WAS GIVEN; OR THAT THE PARTY COULD NOT BE FOUND; OR THE FACTS WHICH EXCUSE PRESENTMENT AND DEMAND; (6) THAT NOTICE OF DISHONOR HAD BEEN GIVEN; (7) THE SIGNATURE AND SEAL OF THE NOTARY.

MUSSON *v.* LAKE.¹

IN THE SUPREME COURT OF THE U. S., DEC., 1845.

[*Reported in 4 Howard, 262.*]

The Form of the Action.—Lake was sued as indorser of the following bill of exchange:—

“ *Vicksburg, 17th December, 1836.*

“ *Exchange for \$6,133 88.*

“ *Twelve months after first day of February, 1837, of this first of exchange (second of the same tenor and date unpaid), pay to the order of R. H. & J. H. Crump six thou-*

¹This case cited in Story on Bills of Exchange, 325; Wood's Byles on Bills and Notes, 575; Benjamin's Chalmers on Bills, Notes and Checks, 165; Bigelow on Bills and Notes, 87, 107; Bigelow's Cases on Bills and Notes, 100; Daniel on Negotiable Instruments, 654, 896, 898, 953, 970, 983; Norton on Bills and Notes, 127, 160, 322, 349; Tiedeman on Commercial Contracts, 326, 318, 334, 346, 507, 508; Randolph on Commercial Paper, 29, 37, 47.

sand, one hundred and thirty-three dollars, value received, and charge the same to account of

Steele, Jenkins & Co."

*"To Kirkman, Rosser & Co.,
New Orleans."*

*"Indorsed: R. H. & J. H. Crump,
W. A. Lake."*

"Kirkman, Rosser & Co., New Orleans, 3d February, 1838,—protested for non-payment.

A. Mazureau, Not. Pub."

It being admitted, that Vicksburg, where said bill bore date, was in the State of Mississippi, and New Orleans, the place of payment, was in the State of Louisiana, the plaintiffs then offered to read in evidence to the jury, the protest of said bill of exchange; which protest, thus offered to be read, is in the words and figures following, to-wit:—

UNITED STATES OF AMERICA, *State of Louisiana.*

By this public instrument, protest, be it known, that on the third day of February, in the year one thousand eight hundred and thirty-eight, at the request of the Union Bank of Louisiana, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Adolphe Mazureau, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, *demande payment of said draft, at the counting-house of the acceptors thereof, and was answered by Mr. Kirkman that the same could not be paid.*

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered for want of payment of the said draft.

Thus done and protested, in the presence of John Cragg and Henry Frain, witnesses.

In testimony whereof, I grant these presents under my signature, and the impress of my seal of office, at the city of New Orleans, on the day and year first herein written.

[L. S.]

A. MAZUREAU, Notary Public.

But the defendant *objected to said protest, and the copy of the bill on the reverse side thereof written being read in evidence to the jury, on the ground that it was not stated in said protest that the notary presented said bill of exchange to the acceptors, or either of them; or had it in his possession when he demanded payment of the same.*

And that for this alleged defect, which it was insisted could not be supplied by other proof, the said protest was invalid and void upon its face, and could not be received as evidence of a legal presentment of the bill for payment, or of the dishonor of the bill. And, thereupon, on the question whether the said protest could be read to the jury, as evidence of a legal presentment of the bill for payment, or of the dishonor of said bill, the judges were opposed in opinion. Which is ordered to be certified to the Supreme Court of the United States for their decision.

J. MCKINLEY. [L. S.]

J. GHOLSON. [L. S.]

The Claim of the Plaintiff.—On the trial of this cause, and after the original bill of exchange, upon which the suit was brought, had been read to the jury, the plaintiff offered in evidence the protest thereof.

The counsel of the parties to this suit do not differ at all as to the duty of a notary, when making a personal demand of the payment of negotiable paper prior to the protest thereof. *We concur in opinion, that he must have the note or bill with him, and should present it for payment, etc.; and the only difference which arises is, as to the species of evidence which is indispensable to prove the fact of presentment.* Must the term itself be used in the protest, and will no form of words therein supply its place? This is the position assumed for the defendant; and, this being controverted, the issue is made which is now to be disposed of.

A number of authorities have been cited by the learned counsel for the defendant, which, though certainly applicable to the duties to be performed by a notary *ante* protest, are believed not to decide the question raised here; nor, if they did, can it be conceded that they would be conclusive, upon a matter specially pertaining to Louisiana's jurisprudence.

The stress of the argument in the learned counsel's brief is that in all cases the fact of presentment must appear, *in verbo*, upon the face of the protest. and this is assuredly not so. For example: if a note or bill should be payable at a particular place, and the notary takes it thither at maturity, and there should be no one there to whom to present it, or of whom to demand payment, the law dispenses the party with making either, and the notary, of course, from certifying either, for *nullus cogitur ad vana*. So in the case of a lost note; a valid protest could be made thereof without its production, if an adequate indemnity was tendered to protect the party from all future liability, or to reimburse him for any payments he should be constrained to make. In these and analogous cases, it could hardly be insisted, either that the law required the notary to certify to a presentment which was never made, and the failure whereof the law excuses; or, that the protest would be invalid without it. One of the most important of the cases cited adversely is a strong authority to establish this. It is the case of *Freeman et al. v. Boynton*.¹ The court there, after affirming the necessity of having the note or bill present when the demand is made, says:—

“This rule may admit of exceptions,—as where the security may be lost; in which case a tender of sufficient indemnity would make the demand valid, without producing the security. And where, from the usual course of business, of which the parties are conversant, the security may be lodged in some bank, whose officers shall demand payment, and give notice to the indorser, according to the custom of such banks,—*the security not being presented at the time of the demand, but the parties being presumed to know where it may be found.*” Here, again, presentments are dispensed with, in cases where protests are authorized; and surely these protests must dispense with averments which would not be true.

The forms of protest vary in different countries. They vary in different states. They vary in the same state. They must necessarily adapt themselves to the true circumstances attendant upon the dishonor of bills and notes.

¹ 7 Mass. R., 483.

The acts of public officers are favored to the extent that they are presumed to know their duty, and to do their duty, unless the contrary appears. A notary has no right "to demand payment," in the absence of the security which attests the party's liability, or without its presentment; and of course he is presumed to know that he cannot do it. Where, then, notaries "demand payment," they have a right to the presumption that the demand followed the presentation. A contrary doctrine casts the presumption against the officer, and arraigns him, by implication, for a breach of duty; and that, too, in the absence of an interest or a motive. Hence, therefore, a "demand of payment," in the absence of other words, far from implying an actual presentment, would imply that there was none. It is believed that no principle, nor usage, nor even precedent, gives the sanction of its authority to accusatory implications like these.

If the protest had averred, that "payment was duly demanded," surely that would have implied that the demand was made upon presentment; and if so, it is to be implied that the demand alleged in this protest was otherwise than duly made. If a protest states the substance of what is required to be done, it is all that is needed. No form of words is sacramental; protests have been holden good, though they stated that the demand was made "at the maturity" of the bill or note; or "at the time they were due," in lieu of the usual mode of stating the precise day, month, and year when the demand was made. So, notaries must make their demand within certain hours of the days when the bills or notes mature. Demands made in unseasonable hours would be of no avail. Nevertheless, protests but rarely enter into such details, but the thing itself—the presentation—is as much required to be made within the prescribed hours, as it is required to be made at all. Why, then, is more specialty of statement needed about the exact performance of one duty than the other? Why, if the demand of payment implies that it was made in due time, may it not imply that it was made after due presentation?

But the protest *ad hoc* was made in Louisiana. If good there, it must be good elsewhere. Commercial usages, how-

ever ancient, however prevalent, and however reasonable, cannot confront her statutes and annul them, nor reverse her courts' judgments which settle their meaning. Most disastrous would be the results were it otherwise; for notarial offices in the large cities have their printed forms of protests, which they use in all cases in like conjunctures, and which have been in use for years, and are in daily use; and in heavy business offices (like that of Mazureau's), there are sometimes from twenty to a hundred protests made in a single day, in behalf of the banks; and hence there are vast and incalculable interests dependent upon the validity of these protests, and it would be an intolerable grievance to dealers in commercial paper, if, while these protests bound indorsers in Louisiana, they released them elsewhere.

A rapid synopsis of the statute and decisions of the Supreme Court of Louisiana will settle the law of protests specially applicable to the case at bar.

The act of the Louisiana General Assembly, of March 13th, 1827, section 1, provides:—"That all notaries, or persons acting as such, are authorized in their protests of bills of exchange, promissory notes, or orders for the payment of money, to make mention (not of the presentment, but) of the demand made upon the drawer, acceptor, or person, on whom such order or bill of exchange is drawn or given; and of the manner and circumstances (not of such presentment, but) of such demand; and whenever they shall have so done, a certified copy of such protest, etc., shall be evidence of all the matters therein stated."

In the case of the Louisiana Ins. Co. *v.* Shaumburg,¹ it was decided that a notary's certificate of demand of payment and protest may be contradicted by other evidence. If it might, evidence might be marshalled to rebut that contradiction, and even supply, by parol, omissions excepted to; and if this were so, the objection to the protest at bar should not have been to its admissibility, but to its effect, etc. And this would accord with the decision of *Allain v. Whittaker, et al.*,² which declares that "the uniform practice in this state has

¹ 2 Mar., N. S., 511.

² 5 N. S., 513.

been to receive the protests of notaries as evidence of the demand on the maker of a note or acceptor of a bill of exchange."

In the case of *Gale v. Kemper's Heirs*,¹ the court says,—
"The note was made payable at the office of discount and deposit of the Bank of the United States, in the city of New Orleans, and the protest states, that (not the presentation, etc., but) the demand was made there of the proper officer. When a note is payable at a particular place, a personal demand on the drawer or maker cannot be made, and it is not always required. It suffices to have been made of any persons there."

In the case of *Thatcher v. Goff*,² the court gave a striking instance of its liberality of interpretation when construing the language of protests. It decided that, where certain notes, payable at the Branch of the United States Bank at Natchez, are protested by a notary residing in Natchez, who states in his protest that he demanded payment at the United States Bank, it will be considered as meaning the Branch at Natchez, and not the principal Bank of Philadelphia; thus supplying, by intendment, the important words, "Bank at Natchez," which the notary had omitted in his protest.

The learned counsel has cited the case of *Warren v. Briscoe*,³ but it is believed to be clearly distinguishable from the case at bar. There the note was "payable at the Planter's Bank of Mississippi at Natchez," and the protest stated that "he went to the Planter's Bank, Natchez, and was informed by the teller, there were no funds in the bank for the payment of said note; wherefore he protested," etc. Not only is no presentment stated, but there are no words from which it is to be implied, for no demand is stated to have been made; and though it be inferable that there was some note of the party which the bank had no funds to take up, yet *non constat* that it was the note in question, unless the same had been exhibited to the teller. But this case was fully reviewed in the next case to be cited, which it is respectfully suggested is decisive of the validity of the protest in question.

¹ 10 Louisiana, 208.

² 13 Louisiana, 363.

³ 12 Louisiana, 472.

The case referred to is that of Nott's Executor v. Beard.¹ The protest passed upon was from the identical notarial office which made the one in the case at bar. It is couched in the like language, thus:—"I demanded payment of said draft at the counting-house of the acceptors thereof, and was answered by Mr. Burnett, one of said firm, that the same could not be paid." It is to every extent the very case at bar; it decides emphatically, that, under the laws of Louisiana, the word *presentment* is unnecessary in notarial protests; and the word *demand* implies the presentment, and is all-sufficient.

The Claim of the Defendant.—This is an action brought by the plaintiff against the defendant, as indorser of a foreign bill of exchange. The question raised in the Circuit Court, and upon which the judges divided in opinion, was whether the protest offered in evidence showed upon its face "*that a presentment to the drawees of a bill,*" and a demand of payment, had been made. The protest does not state that the bill was "presented" to the drawees and payment demanded, *but simply that the notary demanded payment of the bill, without alleging that he presented it, or that he had it with him and exhibited it at the time he made the demand.* We maintain that, by the settled principles of the commercial law, the protest of a foreign bill must show, *that at the time the notary demanded payment he had the bill with him, ready to deliver in case it should be paid;* this is generally done by stating that he presented or exhibited the bill. It does not necessarily follow, from a mere statement that he demanded payment of the bill, that he had the bill with him, and presented it or exhibited it to the drawees or acceptor, because he could demand payment of the bill without actually having it with him. To present a bill for payment is to exhibit or show the bill itself to the drawer or acceptor; to demand payment of a bill is to request its payment; and this request may be made whether the bill be present or not. A presentment *ex vi termini* imports that the bill itself was shown to the acceptor. A mere demand of payment does not necessarily import that the bill was shown and exhibited to the acceptor at the time the demand was made.

¹ 16 Louisiana, 308.

It is essential, to constitute a legal demand of payment of a bill or note, that it should be presented to the acceptor at the time the demand is made, or, in other words, that the person who makes the demand should have the bill with him. In *Hansard v. Robinson*,¹ the court of the King's Bench decided that the holder of a bill of exchange cannot insist on payment without producing and offering to deliver up the bill. The same principle is asserted in *Freeman v. Boynton*,² and other authorities.³

The contract of an indorser is conditional; he promises that the bill shall be paid if it is duly presented for payment, or if not paid upon presentment, and notice of its non-payment be given to him, that he will pay it. These constitute conditions precedent to a right of recovery against him.⁴ And being conditions precedent, the proof must be clear and explicit to charge him.⁵ In the last case, the Supreme Court of New York say:—"The question is not what inference the jury might draw from the evidence, but what testimony does the law require in such case. We have seen that this is a condition precedent, and strict proof is required. The law has allowed the indorser this protection; nothing short of clear proof of notice shall subject him to liability. The reason and justice of requiring proof against a surety will not be doubted. It is imposing no hardship on the party," etc. In that case, the proof was, that notice was left at the office of the defendant, or at the post-office. In the one case the notice would have been sufficient, in the other it would not; and as the proof did not affirmatively and clearly show that it was left at the office of the defendant, it was held insufficient. So here, if the bill was present, and shown to the acceptor when the demand was made, it was sufficient to charge the indorser; *if it were not present, and ready to be delivered up when payment of it was demanded, it was not sufficient*; and as the

¹ 7 Barn. & Cressw., 90; 14 Eng. Com. Law Rep., 20.

² 7 Mass. Rep., 483.

³ Vide Chitty on Bills, edit. of 1836, 385, *et seq.*; 12 Louisiana, 473.

⁴ Chitty on Bills, edit. of 1836, 385.

⁵ 20 Johns., 381.

evidence (that is, the protest) does not show it was presented or exhibited when the demand was made, it necessarily follows that the proof was insufficient to charge the indorser; because, as before shown, the statement in the protest, that he demanded payment of the bill, does not of itself import *ex vi termini* that he had the bill with him when such demand was made. The refusal to pay in this case, when payment was demanded, may have been predicted upon the fact, that the notary did not have the bill. Every fact stated by the notary in this protest may be true, and yet no dishonor of the bill have occurred on which to charge the indorser. The protest must show every act to have been done that is necessary to charge the indorser, and can leave nothing to inference or intendment. If every fact stated in this protest might be true, and the bill itself never have been exhibited or shown for payment, the proof is insufficient.

In suits against indorsers of foreign bills of exchange, the only legal evidence to prove the presentment of the bill and demand of payment is the protest. In regard to the drawer, if he had no funds in the hands of the drawee no protest is necessary, and an explicit promise to pay by an indorser may waive the necessity of a protest; but without such express waiver, a protest is the only evidence of presentment and demand known to the law. "Whenever," says the law,¹ "notice of non-payment of a foreign bill is necessary, a protest must also be made, which, though on first view it might be considered mere matter of form, is, by the custom of merchants, indispensably necessary, and cannot be supplied by witnesses or the oath of the party, or in any other way; and it is said is part of the constitution of a foreign bill of exchange, because it is the solemn declaration of a notary, who is a public officer recognized in all parts of Europe that a due presentment and dishonor has taken place, and all countries give credence to his certificate of the facts stated."²

To make the protest evidence of presentment and dishonor, it must then show on its face the solemn declaration

¹ Chitty on Bills, edit. of 1836, 489, *et seq.*

² 10 Mass. R., 1; 12 Pick., 484; 4 Har. & Johns., 54, 61; 4 Wash. C. C. R., 468.

of the notary, that a due presentment of the bill and its dishonor has taken place, and to constitute such due presentment and dishonor, it has been shown that a presentation or exhibition of the bill itself to the acceptor, and a demand of payment, is necessary. And to establish a legal presentment, the bill must accompany the demand. The evidence must affirmatively show that fact, and as the protest in case of a foreign bill is the only evidence admissible to prove it, it must show that the bill accompanied the demand, by stating that it was presented, etc., or other equivalent words. This is expressly stated by Mr. Chitty.¹ He says,—“When the drawee, etc., refuses to pay the bill, the holder should cause it to be protested. For this purpose, he should carry the bill to a notary, who is to present it again to the drawee and demand payment,” etc. If the drawee again refuses to pay, the notary is thereupon to make a minute, etc. The next step is to draw up the protest, which is a formal declaration, on production of the bill itself, etc., “that it has been presented for payment and payment refused,” etc.

In countries governed by the commercial law, the form of the protest shows that the bill itself must be stated to have been presented in the protest, as well as the demand of payment. The form runs thus: “On this day, the 1st, etc., at the request of A. B., bearer of the original bill of exchange, whereof a true copy is on the other side written, I, B. C., notary, etc., did exhibit the said bill,” etc., etc. The demand of payment and refusal is then stated, *vide* form.²

If it be necessary to exhibit the bill at the time payment of it is demanded, it would seem necessary to prove it; and if it be necessary to prove it, the protest, which is the instrument of proof, must not only show a demand of payment, but a presentation of the bill itself at the time the demand was made. And in conformity with these principles, the Supreme Court of Louisiana held, in the case of Warren v. Briscoe,³ the protest must show that the bill itself was *presented*, etc.

¹ Chitty on Bills, edit. of 1836, 492.

² Chitty on Bills, edit. 1836, 497.

³ 12 Louisiana Rep., 475.

This case, it is true, has in effect been overruled by the case of *Nott's Executor v. Beard*,¹ although the court endeavored to reconcile the two cases. The last case, it is submitted, is irreconcilable with the principle and the adjudicated cases hereinbefore cited. It substitutes inference or presumption for fact, and decides the point mainly on the ground that the notary is a public officer, and must be presumed to have done his duty. It introduces a new rule, unknown to the commercial law, and substitutes inference of a fact, the existence of which the law required should be shown by express proof; and, moreover, it assumes to raise the presumption from the statement of a fact (to wit, demand), which by no means necessarily imports that the bill was presented when such demand was made. The case is, as we will endeavor to show, inconsistent not only with the previous case in the same court in 12 Louisiana, but with principle.

The court (p. 312) admit the law to be, that the person making the demand must have the bill with him; but, say they, "It does not follow as a consequence, because both words are not used in the protest, that he had not the bill with him." By "both words," we understand the court to mean the words "presentment" and "demand," as used in the previous part of the sentence, in which they say,— "The person making the 'presentment' or 'demand' must have the bill with him." With all due deference to the opinion of that court, for whom we entertain the highest respect, the question was not whether it followed as a consequence, because both words were not used, that the notary had not the bill with him, but whether it followed as a consequence, from the statement of the one used, to wit, "demand," that he had the bill with him. The law required the plaintiff to prove that he presented the bill and demanded its payment, which was refused. It does not follow, that, because he demanded payment of a bill, therefore he had the bill itself with him and presented it. He may have had it when he demanded payment, or he may have demanded payment of the bill without having it. It is probable he had it, but the law will not permit the liability of an indorser to be established by the substi-

¹ 16 Louisiana R., 308.

tution of probability for proof. The statement, therefore, that he demanded payment of it, is not proof that he presented or exhibited it. If it be essential that the bill should be presented or shown, and payment thereof demanded, it follows that both the presentment of the bill for payment and the demand of payment should be stated. Chitty (page 492) says the notary should present it and demand payment, and if payment is refused he should protest it, which is a formal declaration that he presented it, etc. From this, it appears the protest must state the presentment, that is, the exhibition of the bill to the acceptor, and the demand of payment.

Aware of the difficulty of sustaining their opinion, if the same rule of evidence applied to the statements of the notary that would apply to the same statements on oath by a private individual, they say he is a public officer, and it is not to be presumed that he would do so unless an act as to go to the house of the acceptor and demand payment if he had not the bill with him, and that the law will presume the notary had done his duty. The principle, that the law presumes public officers to do their duty, it is respectfully submitted, was misapplied by the court. It is true, in a proceeding against an officer for dereliction of duty, the presumption is that he has done his duty, and the contrary must be proved, though it involve a negative. But if this principle applies to a collateral proceeding like this, it proves too much, and the long train of recorded decisions, requiring a protest to be produced on the trial, will at once be struck from the commercial code. If the law presumes he will do his duty, why require the protest to be produced, proof that the bill was left with him to protest would be sufficient, because, as it was his duty to protest it, it will be presumed he did so. So, when it is made his duty to give notice when he protests a bill, as is the case in some states, no notice need ever be proved; all that is necessary, upon the principle assumed by the court, is in such case to prove the protest, and then, as it was the notary's duty to give the notice, it will be presumed he gave it. Nay, if it be proved that the bill was put in his hands to protest, it will be presumed he did his duty, and therefore it will be presumed he did protest it. But the question might be here asked,

What is the duty of a notary when a foreign bill is placed in his hands for protest? It is not merely to present and demand payment, but to set forth these facts in his protest. If he omits to do so, the protest on its face shows he has not done his duty, and of course the presumption falls to the ground. The principle might be carried out to cure any defective statement as to the time notices were given; if omitted to be stated when notice was given, as the notary's duty was to give notice, at furthest, the day after the protest, it could be presumed he did so, although his protest does not show the time when he gave the notice.

The court endeavor to distinguish the case from the one in 12 Louisiana, 472. They say, in the last named case, the notary certified that he went to the Planters' Bank, and was informed by the teller there were no funds in the bank to pay the note, etc. He does not say, says the court, that "he presented the note or made a demand of payment." What was the use to do so, if their opinion in 16 Louisiana is correct? According to that opinion, as he was presumed to do his duty, and as it was his duty to present the note and demand payment, this would be presumed; nay, as they say in that case, that it is not to be presumed the notary would do so unless an act as to go to the house of the acceptor without the bill; so, in this case, they might with equal justice have said it would not be presumed he would go to the bank to demand payment, and yet make no demand when he got there. Why was it not presumed he did his duty in that case, as well as in the last? Simply because in that case the court decided, very correctly, that the facts which constitute a legal presentment, etc., must appear on the face of the protest, and cannot be presumed.

Upon the whole, it is believed, both on principle and authority, that the case in 16 Louisiana cannot be sustained, and that the protest in this case is not legal evidence of presentment, to charge the defendant.

Decision.—The plaintiffs brought an action of assumpsit, in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburg, in said state, by Steele,

Jenkins & Co., for \$6,133, payable twelve months after the first day of February, 1837, to R. H. & J. H. Crump; and addressed to Kirkman, Rosser & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected; because it did not appear in the protest, that the notary had *presented the bill to the acceptors, or either of them*, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion. Which division of opinion they ordered to be certified to this court; and upon that certificate the question is now before us for determination.

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. A presentment to and demand of payment must be made of the acceptor personally, at his place of business or his dwelling.¹ Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased.²

Why Must a Presentment be Made.—The reasons why presentments should be made to the drawee are:

¹ Story on Bills, § 325.

² Chitty on Bills, 7th London ed., 246, 247; Story on Bills, 360; 5 Taunt. R., 30; 12 Wend. R., 439; 2 Douglass, 515; Warrington v. Furber, 8 East, 245; Esdaile v. Sowerby, 11 East, 117; 14 East, 500.

- 1st. That he may judge of the genuineness of the bill;
- 2nd. That he may judge of the right of the holder to receive the contents; and
- 3rd. That he may obtain immediate possession of the bill upon paying the amount.

The acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill, upon paying it, to be used as a voucher in the settlement of accounts with the drawer.¹

Mr. Justice Story has given the form of a protest now in use in England, in his treatise on bills of exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for non-payment."² This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment of it for payment or acceptance.³ But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Every thing, therefore, that he does in the performance of his duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte*; and the evidence contained in the protest is credited in all foreign courts.⁴ The evidence contained in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

¹ Story on Bills, § 361; *Hansard v. Robinson*, 7 Barn. & Cressw., 90.

² Story on Bills, 302, note.

³ Story on Bills, § 360.

⁴ *Chitty on Bills*, 215; *Rogers v. Stephens*, 2 T. R., 713; *Brough v. Parkings*, 2 Ld. Raym., 993; *Orr v. Maginnis*, 7 East, 359; *Chesmer v. Noyes*, 4 Camp., 129.

But the counsel for the plaintiffs insists, that the statute of Louisiana, and the interpretation given to it by the Supreme Court of that state in the case of *Nott's Executor v. Beard*,¹ have so changed the law merchant, as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that court said it might perhaps have been more specific if in the protest it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled, that, before the holder of an accepted bill can call on the drawer for payment, he must make a presentment for, or demand of, payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotations on them. And as further proof and illustration, and to show that *demand of* payment should be preferred to *presentment for* payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word *demand* is used in it, and that the word *presentment* is not; and they refer to the statute, also, to show that notaries were vested with certain powers by it, which gave authority to their acts, and that they being public officers, the presumption of law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they

¹ 16 Louisiana, 308.

have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Ld. Tenterden, C. J., said on this subject, in delivering the judgment of the Court of King's Bench, in the case of *Hansard v. Robinson*, before referred to. He said,—
“The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher, and discharge *pro tanto*, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?” This extract, we think, furnishes a full answer to all that has been said by the Supreme Court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment; and to the presumption of law relied on to cure the defects in the protest.

But to show, that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been, to give authority to notaries to give notices, in all cases of protested bills and promissory notes; and to make their certificates evidence of such notices. And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the

principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words: "That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand; and by certificate, added to such protest, to state the manner in which any notices of protest to drawers, indorsers, or other persons interested were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated."

It seems to have been taken for granted by the legislature, that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices, and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase, "and of the manner and circumstances of such demand," cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding, that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The legislature cannot

be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but reasonable, therefore, to give the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The *manner of the demand* must, therefore, mean the presentment of the bill for either acceptance or payment; and *the circumstances of the demand*, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear, that bills payable at sight, and after sight, are within the meaning of the statute; because it provides for a demand of payment of the acceptor of a bill. Now how can there be an acceptance of a bill, without a presentment for acceptance? Until the bill becomes due, payment cannot be demanded of the drawee. This shows, that without the word presentment and the word demand also, the plain meaning of the statute could not be carried into effect. *A bill, payable at a fixed period after its date, need not be presented for acceptance; it is sufficient to present it and demand payment when it arrives at maturity;* but a bill payable at sight, or after sight, can never become due until after it has been presented for acceptance or payment. How is the holder or the notary to obtain the acceptance of such a bill, under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due, then it must be admitted, that, by fair and necessary construction, the word presentment is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

The Laws of What Place Control the Liability of Parties to Negotiable Contracts.—There is, however, another question, entirely independent of the statute and the decision of the Supreme Court of Louisiana, which may be decisive of the case before this court; and that question is, Whether the contract between the holder and indorser of the bill in controversy is to be governed by the laws of Louisiana, where the bill was payable, or by the laws of Mississippi, where it was drawn and indorsed. *The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it.* The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the laws of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter state.¹

Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi the custom of merchants has been adopted as part of the common law: and by that law and their statute law, this case

¹ Story on Bills, § 366; 4 Peters, 123; 2 Kent's Comm., 459; 13 Mass. R., 4; 12 Wend. R., 439; Story on Bills, § 76; 4 Johns. R., 119; 12 Johns. R., 142; 5 East, 124; 3 Mass., R., 81; 3 Cowen, 154; 1 Cowen, 107; 5 Cranch, 298. See also Daniel on Negotiable Paper, Sec. 1265; 28 N. E. Rep., 515; 81 N. Y., 571; 57 N. W. Rep., 865; 91 Ind., 440; 22 Ia., 194; 46 N. H., 300; 25 Ohio St., 413; 55 Minn., 259; 47 Ia., 477; Story on the Conflict of Laws, Secs. 242, 280, 281; 39 Ohio St., 63.

must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill; which is ordered to be certified to the Circuit Court accordingly.

Mr. Justice McLean said, "I think the protest was evidence. The notary made demand of payment, at the maturity of the bill, and we know that he had possession of the bill, from the fact of the protest being made on the same day. Now as the notary could not make a legal demand in the absence of the bill, the fair, if not the necessary, inference is, that he had possession of the bill when he demanded payment."

Mr. Justice Woodbury said, "I regret being compelled to dissent from a portion of the opinion of the majority of the court which has just been pronounced. This I should be content to do without explanation, if the grounds for it did not appear to be misunderstood. I do not question that a note should be present usually when payment is demanded;¹ and that a written protest is the proper evidence to show a presentment or demand in the case of a foreign bill of exchange.² But, in my view, a protest like this was competent evidence to be submitted to the jury, in order that they might infer from it that the note was presented when the demand was made. That was the point presented by the division of opinion between the judges in the court below. One held it was competent evidence from which to make such an inference, and the other, it was not; and we are merely to decide which was right.

The question of due presentment and demand is a mixed one of law and fact, and not one of mere law, unless all the facts are first conceded or agreed.³ This is an analogy of the rule about notice.⁴ In all cases where it is possible for the

¹ Freeman v. Boynton, 7 Mass. R., 483; 17 Mass. R., 449; 3 Metcalf, 495.

² 8 Wheat., 333; Burke v. McKay, 2 Howard, 71.

³ United States v. J. Barker, 1 Paine's C. C. R., 156.

⁴ 1 Peters, 583.

jury on any reasonable hypothesis to infer a proper presentment from the protest offered, it is safer that the writing should not be withdrawn from them, but go in, and the court instruct the jury on the whole evidence what the law was on such facts as they might be satisfied of. Chancellor Kent¹ thinks it very difficult, in these mixed questions of law and fact about commercial paper, to do justice by any other course. In this case the jury might or might not be satisfied of the fact of the bill being present when the demand was made. But why not let them pass on that fact? It is manifest that no evil or danger would result from leaving the matter to them, under due instructions from the court, provided there be no legal obstacle to such a course.

It is conceded, on both sides, that the protest is competent evidence, and contains enough from which the jury could infer a demand of payment. That is the most material part of the notary's duty. It is not only so described in some elementary treatises, but the duty of having the note present, or of calling with it at the hours of business alone, are not described separately; but are involved or implied in the general duty of making a demand. Thus Dane, in his Abridgment, Bills of Exchange,² says,—“In making a protest, three things are to be done,—the noting,³ demanding, and drawing up the protest.” “The material part is the making of the demand.” So the word *demand* is at times used as synonymous with the word *presentment* by Bailey.⁴

But the protest in this case states not only a demand, but that payment of the bill was refused, and he had it in possession, so as to make a copy “of the original draft,” on the back of the protest, or, to use his own words, “whereof a true copy is on the reverse hereof written,” and also “demanded

¹ 3 Comm., 107.

² Art. 11, § 1.

³ The “noting” is simply the making of a memorandum of what the notary did so that he may subsequently have the facts upon which the certificate may be made. This should be done on the day the demand and presentment are made. The certificate of protest may be made at any time. *Dennistown v. Stewart*, 17 How., 606.

⁴ 16 Louisiana Rep., 311.

payment of said draft," and was answered, "that the same could not be paid."

Under these expressions, it could hardly be deemed unfair, or any stretch of probability, to infer that the bill was present at the demand, and the more especially as the notary knew it was his duty to have it present, and does not state that any objection was made, or refusal to pay, on account of its absence, as he should have stated, if such was the truth. My views do not differ from those of a majority of this court concerning the importance of having the principles as to commercial law, and especially commercial instruments, uniform, and as little fluctuating as possible; and hence as to them I would make no innovation here. But our difference is rather on a question of evidence. Thus, had the testimony offered been submitted to the jury, and they had inferred from it a due presentment of the note, it would not change any commercial principle as to the necessity of presentment, but merely establish the fact of presentment here on evidence deemed by the jury to render that fact probable. And if juries should be disposed to find such a fact on slight testimony, it would do no injury to commercial paper, or commercial principles, or substantial justice between parties, but merely indicate an increased liberality as to forms, where substance has been regarded; that is, where the vital point in the transaction is beyond controversy, namely, that payment has clearly been demanded and not made. Such a course would accord, also, in spirit, with what was laid down by this court in *1 Peters*, 583, that rules as to commercial paper ought to be formed and construed so as to be reasonable and founded in general convenience and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description.

There is nothing in the nature of protests and presentments which on principle requires any increased strictness in the proof of them, but, on the contrary, much to justify every reasonable presumption in their favor. Any holder would be anxious to get his money at once of the drawee, and not neglect to have the note with him so as to give it up on payment and prevent delay. So would he wish to be paid and

excused entirely from making protest, rather than resort to that and notice, and suffer the delay of recovering it of a drawer or indorser.

Both of these considerations strengthen the inference that he and his agent would present the note, or have it with them, when demanding payment, and render it reasonable, after slight proof of presentment, to leave it to the opposite party to rebut that inference, so natural, by stronger proof that the note was not present, if the facts would warrant such proof.

Another consideration against requiring great or greater rigidity in the evidence of a presentment and form of protest is the fact, that a protest is of less materiality than notice.

As an illustration, that the notice is deemed more material than the protest, "omitting to allege in the declaration a *protest* of a bill is only form, not to be taken advantage of on a general demurrer."¹

But, omitting to state a *demand* or *notice* is bad after verdict.²

Dane, in his Abridgment,³ says,—"Notice is very material. Protests are mere matter of form." Yet notice may be very loose, and it answers in all cases, if it disclose merely the fact of *demand*, and a reliance on the person notified for payment.⁴

"The notice, however, should inform the party to whom it is addressed, either in express terms or by necessary implication, or, at all events, by *reasonable intendment*, what the bill or note is, that it has become due, that it has been duly *presented* to the drawer or maker, and that payment has been refused."⁵

But it has again and again been held, that the notice need not state a presentment in express terms, and that it will

¹ 1 Dane's Abr., Bills of Exchange, ch. 20, art. 11, § 9; Lill. Ent., 55; 3 Johns. R., 202; Solomons v. Staveley, Doug., 684, in note to Rushton v. Aspinall.

² Doug., 684.

³ Vol. 1, p. 395, ch. 20, art. 10, § 1.

⁴ Shed v. Brett, 1 Pick., 401; Miller v. Bank of United States, 11 Wheat., 431; Gilbert v. Dennis, 3 Metc., 495; 2 Johns. Ch. R., 337; 12 Mass. R., 6; 4 Wash. C. C. Rep., 464.

⁵ Chitty on Bills (9th Lond. & 10th Amer. edit.), 469.

be implied from stating a demand and non-payment, and a looking to the indorser.¹ So, "Your note has been returned dishonored," is enough from which to intend all.²

It may be a letter,—merely to that effect,—and need not be a *copy of the protest*.³ And it has been adjudged, that the notice need not state, in express terms, that the note was present, or if present was exhibited, if it only contained matter from which, by *reasonable intendment*, this can be inferred.⁴

It not being necessary, then, to inform the indorser of the presentment of the note itself, in so many words, there seems to be no use in having the fact stated at length in the protest, if enough appear to render the fact probable.

It would be difficult to find a reason, in the absence of positive law, why the form of the protest should not be dealt by as liberally as that of notice; and if, like the other, it disclose a demand, allow the jury to infer from that, as in the case of notice, that the note was present. Indeed, a protest is not required to be in writing at all except in case of foreign bills, drawn on persons abroad.⁵

The Purpose of a Protest.—*And then it doubtless originated in a rule merely allowing it to be done to save the expense and trouble of bringing a witness from abroad to prove the fact, rather than making it imperative.*

Instead of a written protest being better evidence than a witness of the presentment and demand in case of inland bills or promissory notes, or even foreign bills drawn on persons here, it is inferior evidence to witnesses for proving present-

¹ 9 Peters, 33; 3 Kent's Comm., 108; 10 Mass. R., 1; 4 Mason, 336; 1 Johns. Cas., 107.

² See various other illustrations, 6 Adolph. & Ellis, 499; 5 Dowl., 771; 2 Chit. R., 364; 2 Mees. & Welsb., 109.

³ 1 Chit. (2d Eng. & 1st Amer. edit.), 363, 364, 498, 499; 3 Camp. R., 334; 2 Starkie, 232; Goodwin v. Harley, 4 Adolph. & Ellis, 520, 870; 4 Eq. R., 48. See 8 Mass. R., 386.

⁴ Chitty on Bills (last edit.), 469; 2 Peters, 254; 9 Peters, 33.

⁵ Chitty on Bills, 643; Rogers v. Stevens, 2 D. & E., 713; 2 Starkey on Ev., 232; 6 Wheat., 572; 8 Wheat., 333; 3 Wend., 173; 2 Peters, 179; 1 Cranch, 205.

ment and demand, and is usually inadmissible, except by special statutes.¹

Some seem to suppose that there is danger in allowing an informal written protest to go to the jury as evidence to be weighed in proving that the note was present. But there can be no more in that than allowing an informal notice to go to the jury. The jury must be satisfied, in both cases, and should so be instructed, that all has been done which the law in both requires. If there be any defense in either case, that all proper has not been done, it can probably be shown by counter evidence in one as well as the other. Why should it not be? and why is not that an ample security against being improperly charged? For the protest is not a written contract between the parties, or a sealed instrument not open to be contradicted by parol evidence. But it is a mere certificate of a notary, a subordinate officer, admitted for convenience as *prima facie* evidence of certain facts, and allowed to that extent in order to save the expense of witnesses and delays, but ought to be always open to be impaired or disproved by the other party in interest, who has never been heard before him, and of course cannot reasonably be concluded forever by his acts. The notary is not required to swear to them, when they are admissible as evidence, as he would be to a deposition, because of his official obligations and standing. But the character and construction that properly belong to his certificate as evidence seem to be like those of a deposition; and if it states, in so many words, that the note was presented, or states what justifies such an inference, there appears to be no good reason why the contrary may not be proved, if such was the fact, and the indorser be thus protected against statements or inferences not well founded. And the absurdity of the contrary course is still more apparent as to protests, when one made by any respectable merchant, and attested by two witnesses, in the absence of a notary, has the same validity as his.²

¹ 1 Chitty on Bills, 405; 3 Pick., 415; 6 Wheat., 572; 5 Johns. R., 375; 4 Wash. C. C. Rep., 148; 4 Camp. R., 129; 2 Howard's U. S., Rep., 71; 8 Wheat., 146.

² Chitty on Bills, 303; Story on Bills, §276.

In *Nicholls v. Webb*,¹ counter testimony was held to be admissible against the minutes of a notary offered to prove demand and notice.

So it is admissible to show that the notary mistook the place, and did not demand the bill at the place of business of the drawee.²

In *Vandewall v. Tyrrell*,³ counter evidence was offered, and avoided the protest, because the clerk of the notary, and not the notary himself, as stated in the protest, made the demand.⁴

This point thus being established on both principle and precedent, all the danger or difficulty as to the merits of the case, by admitting a protest like this, is obviated. But it is further urged against it, that presentment is averred in the declaration, and therefore must be proved. This we admit. And so is notice averred in the declaration and notice of a presentment, and so that it must be proved.⁵ All we urge here is to let them be proved by similar general statements, from which the similar inferences may be drawn in one case as the other, that the note was present at the time of the demand, unless the contrary is shown,—as it may be, if true.

Again, it is said that the forms of protest generally state, that the bill was present or exhibited. This is true.⁷

But we are aware of no case deciding that this fact must be stated, in so many words, in the protest itself, though we admit that the jury must be satisfied that the fact existed. Minutes in the book of a messenger deceased have been held to be proof to be submitted to a jury as evidence of due demand and notice.⁸ Yet there does not appear to have been a presentment stated, *eo nomine*, or that there was any but

¹ 8 Wheat., 336.

² *Insurance Company v. Shamburg*, 2 Martin's R. (N. S.), 513.

³ Mood. & Malk., 87.

⁴ See Chitty on Bills, 495, note.

⁵ Chitty on Bills, 643-647.

⁶ 1 Chit., 633; Doug., 654, 680.

⁷ 1 Chitty, 395, 396 (1st Amer. edit.); Story on Bills of Exchange, § 276, note.

⁸ *Welsh v. Barrett*, 15 Mass. R., 380.

inferential evidence that he had the note with him.¹ And it is not a little remarkable, that the only statute in England,² which prescribes the form of a protest, and which is in relation to inland bills of five pounds and upwards, in order to recover damages and interest, the form does not state in so many words that the bill was present or was exhibited, but merely "at the usual place of abode of the said A. have *demanded* payment of the bill," etc.³ In such cases, precisely that, and that alone, must be done which is contended for here, namely, leave it to the jury to infer the presence of the bill from its payment being *demanded*, and any other facts stated, unless the contrary is shown. Look at another analogy. It is necessary that the exhibit of the note and the demand be made in the legal hours of business.⁴ But, as in respect to the presence of the note, no case holds that this must appear by so many words in the protest. And it is not stated, in the common forms, that the demand was made in the usual hours of business.⁵ On the contrary, the jury are allowed or instructed that they may infer, from the statement of the demand and non-payment, that they were made within the proper hours. And if it was not, the other party would doubtless be allowed to disprove it by counter evidence.

How can such a case, then, be distinguished in principle from this?—except that there is much less in the usual form of protest from which to infer that the bill was presented in legal hours, than there is in this protest from which to infer that the bill was present when the demand was made. I am the more inclined, also, to the opinion, that this protest is competent evidence, because, under a special law in Louisiana, passed March 13th, 1827, such protests have been adjudged sufficient. Their law uses the word "demand" when describing what the protest shall contain, and such a protest

¹ See, also, *North Bank v. Abbott*, 13 Pick., 469.

² 9 and 10 Will., 3.

³ *Chitty on Bills*, 465 (9th ed.).

⁴ *Chitty on Bills*, 349, 354; *Reuben v. Bennet*, 2 Taunt., 388; 2 Camp., 537; *Parker v. Gordon*, 7 East, 385; 1 Maul. & Selw., 20.

⁵ 1 *Chitty on Bills*, 396.

is there allowed to go to the jury as evidence from which to infer that the note was present.¹

The bill now in dispute was on its face payable in Louisiana; and hence the principles of commercial law require that the protest be made at the time and in the manner prescribed by that state.²

But whether the statute of Louisiana prescribing what protest shall be sufficient ought to be considered as affecting anything beyond the evidence of protest in its own courts, is not very clear on principle.³

Hence, in forming an opinion, I have placed it mainly on general considerations, though in the construction of a Louisiana statute, which clearly affected the contract, and not the evidence; and where the judgment of its court clearly rested on the statute alone, about which some doubt exists, it ought unquestionably to control us in respect to contracts made or to be fulfilled there, even, if a departure from the general principles of commercial law. I wish, also, to avert some serious consequences that I apprehend may result from the decision of the majority of the court in several of the states of the Union.

Bills of exchange drawn in one state on persons in another must be considered, under the previous decisions of this court, as foreign bills.⁴ Demand of payment, then, cannot be proved in suits upon them out of the state where presented, unless by a written protest, according to the cases before cited.

Whenever the protest, then, in such case, does not state in detail a presentment or presence of the bill, though stating a demand, refusal, and no objection, the protest must, as in this decision, be ruled out as incompetent evidence; and the same decision virtually implies, that no other evidence except the written protest is admissible to show that fact, or indeed

¹ Nott's Executor v. Beard, 16 Louisiana R., 308.

² Story on Bills of Exchange, § 176; 1 Chitty on Bills, 193, 506; Story's Conflict of Laws, § 369.

³ See cases, Story on Bills, § 172.

⁴ Townsley v. Sumrall, 2 Peters, 179, 586, 688; Lohsdale v. Brown, 4 Wash. C. C. R., 87, 153; 1 Hill, 44; 12 Pick., 283; 15 Wend., 527; 5 Johns., 375; Dickins v. Beal, 10 Peters, 579.

any fact which may be omitted by accident or otherwise in the written protest, and that no inference can be admitted to be drawn from the protest as to presentment, when only a demand, refusal, and no objection are stated, as here. These consequences, with others before named, I would avoid, by making the protest competent evidence, and when it showed a demand, refusal, and no objection explicitly, as here, would leave it to the jury, from that and the other circumstances, to say whether they were or were not satisfied that the note was present.

In this way it is easy to reconcile full action of the jury on the facts with that of the court on the law, and this, too, without any innovation or change in the rule as to commercial paper, or any violation of adjudged cases, but rather in conformity to them and to several strong analogies.

This court have in other cases gone still farther, and held it proper even to expand or enlarge the rules of evidence in certain exigencies. In *Nicholls v. Webb*,¹ the principle laid down by *Ld. Ellenborough*, in *Pritt v. Fairclough*,² as to the rules of evidence, was adopted, namely, "That they must expand according to the exigencies of society." And in the *Bank of Columbia v. Lawrence*,³ speaking of a rule as to diligence,

¹ 8 Wheat., 332.

² 3 Camp. R., 305.

³ 1 Peters, 583.

Protest Defined.—Protest may be defined to be a solemn declaration, written, by a notary public, under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, given, and that the bill is, therefore, protested. *Dennistown v. Stewart*, 21 Curtis, 722; 17 Howard, 606; *Cayuga, etc. Bk., v. Hunt*, 2 Hill (N. Y.), 635.

In What Cases Necessary.—Under the *lex mercatoria*, it was necessary to protest foreign bills of exchange only; but now by custom of merchants and bankers in many jurisdictions every commercial contract is protested. In Texas, protest and notice is rendered unnecessary by statute if suit is brought against the acceptor or maker before the first term of the court to which suit can be brought after the right of action shall accrue, or at the second such term after, if good cause for the delay can be shown. Protest may also be waived by the parties to the contract, in which case, of course, it will not be necessary. *Daniel on Neg. Inst.*, Secs. 926, 928; *Wood's Byles on Bills and Notes*, 260.

When to be Made.—Presentment and demand should be

Thompson, J., says,—“ For the sake of general convenience it has been found necessary to enlarge this rule.”

But all I ask here is to go as far as the existing rule of made on the day that the contract legally matures, unless they are excused or unless delay is justified.

Notice of dishonor, or of protest, may be given as soon as the instrument is dishonored. If the parties reside in the same place it must be given before the close of the next day; if payable at a place of business, then before the close of business hours; if payable generally, then before the usual hours of rest of the next day. If, however, the parties reside at different places and notice must be sent by mail, then it must be deposited in the post-office in time for the first out-going mail, unless that it is at an unusually early hour. *Lawson v. Farmer's Bank*, 1 Ohio St., 206; *Illustrative Cases*, 203, and note. If where the parties reside at different places and notice is sent otherwise than by mail, then it must be sent at a time which will insure its receipt at the same time it would have been received if sent through the mails. *Smith v. Poillon*, 23 Hun., 632; *Howard v. Ives*, 1 Hill, 263.

If the requirements of presentment, demand, and notice of dishonor have been complied with properly, the certificate may be made at any time before an action is brought.

Where Made.—Protest must be made according to the law of the place of dishonor, or the place where the bill is made payable. *Chitty on Bills*, 456; *Geralupolo v. Wieler*, 10 C. B., 690; *Mitchell v. Baring*, 10 C. B., 4; 4 C. & P., 35; *Carter v. Union Bank*, 7 Hum., 548.

By Whom Made.—Protest should be made by a notary public. It may, however, be made by any respectable resident of the place where the bill is dishonored or is payable. In the latter case the presentment and demand should be attested by two witnesses. *Daniel on Negotiable Instruments*, Sec. 934a, *Onondaga County Bank v. Bates*, 3 Hill, 53; *Wood's Byles on Bills and Notes*, 394; *Tiedeman on Commercial Paper*, 322; *Chitty on Bills*, 303; *Story on Bills*, 276. The clerk or deputy of a notary cannot protest unless authorized by statute. *Chitty on Bills*, 495, and note.

What the Certificate Must Show.—The certificate of protest must set forth:

1. A copy of the contract or a fair description of it;
2. The fact of presentment for acceptance or payment;
3. The time and place of presentment and demand;
4. The fact of dishonor with the reason therefor;
5. The fact of protest;
6. That notice of dishonor had been sent or given, together with the time of such notice;
7. The signature of the notary;
8. The seal of the notary. *Dennistown v. Stewart*, 21 Curtis, 722; 17 Howard, 606; *Clough v. Holden*, 115 Mo., 336; *Tiede-*

evidence seem to justify, and let reasonable inferences and presumptions be made by the jury from all that is stated in

man on Com. Paper, Sec. 317; Daniel on Neg. Inst., 600; Sulsbacher v. Bank, 86 Tenn., 201; Cox v. Bank, 100 U. S., 716; Wood River Bk., v. First Nat. Bk., 36 Neb., 744.

The Form of the Certificate of Protest.—The following is a common form of the certificate of protest:—

STATE OF MICHIGAN, }
COUNTY OF WASHTENAW. } SS.

Be it Known, That on the first day of September, in the year of our Lord one thousand eight hundred and ninety-eight, at the request of John Doe, I, Joseph H. Vance, a Notary Public, duly commissioned and sworn, residing in the city of Ann Arbor, County and State aforesaid, did present the original promissory (or bill of exchange) which is hereto attached, Richard Roe or [at the place of business of Richard Roe, naming it], and demanded payment (or acceptance) thereof, which was refused.

Whereupon, I, the said Notary, at the request aforesaid, did *Protest*, and by these presents do solemnly protest, as well against the Drawers, Makers and Endorsers of the said promissory note (or bill of exchange) as against all others whom it doth or may concern for exchange, re-exchange, and all costs, charges, damages and interest already incurred and to be incurred by reason of the non-payment (or non-acceptance) of the said promissory note (or bill of exchange.)

And I, the said Notary, do hereby certify, that, on the same day and year aforesaid, due notice that said promissory note (or bill of exchange) had thus been presented for payment (or acceptance) and that payment (or acceptance) thereof had been thus demanded and refused, and that the holders of the said promissory note (or bill of exchange) did and would look to the drawers, makers and endorsers thereof for payment of the same, were put into the Post Office at Ann Arbor, Michigan, with the full legal postage paid thereon, and directed as follows, after diligent inquiry being made for the residence and place of business of the drawers and indorsers:

Notice for John Smith, directed 1015 Main Street, Detroit, Michigan.

Notice for Henry Jones, directed 150 Washington Street, Chicago, Illinois.

Each of the above named places being the reputed place of residence or business of the person to whom the notice was directed.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office.

.....
: L. S. :
:
: ..

JOSEPH H. VANCE,
Notary Public in and for Washtenaw Co., Michigan.

the protest, and thus decide whether the note was not probably present when the demand was made.

The Form of the Notice of Protest.—The following is the usual form of the “notice of protest”:—

ANN ARBOR, MICH., Sept. 1st, 1898.

Take Notice, that the promissory note for one thousand dollars, made by Richard Roe, dated July 29th, 1898, payable one month after date at Ann Arbor, Michigan, and endorsed by you, has this day been presented to the said Richard Roe and demand made for payment thereof, which has been refused; said promissory note has been duly *protested* for non-payment and the holders now look to you for payment of the same.

Yours, &c.,

JOSEPH H. VANCE,

Notary Public in and for Washtenaw County, Michigan.

Protest Dispensed With—When.—Protest may be excused or delayed whenever or under circumstances which would excuse or dispense with notice of dishonor. It will be excused, when prevented by circumstances beyond the control of the holder and not attributable to his negligence or misconduct. For instance, when the party to whom presentment is to be made is quarantined or dead. But when the excuse or cause for delay has been removed, then the protest must be made with reasonable diligence. Daniel on Negotiable Instruments, 730; Hull v. Meyers, 90 Ga., 674; Legg v. Thorpe, 12 East, 171.

Protest for Better Security.—In case the drawee or acceptor becomes bankrupt or makes an assignment for the benefit of creditors before the maturity of the bill, then the holder may cause the bill to be protested for better security against those whose liability is conditional. Daniel on Neg. Inst., Sec. 530.

CHAPTER XIII.

Presentment and Demand.

SECTION 53.

IN AN ACTION BY AN INDORSEE VERSUS AN INDORSER, THE FORMER MUST SHOW PRESENTMENT AND DEMAND, OR DUE DILIGENCE TO GET THE MONEY, AT THE MATURITY, FROM THE PERSON WHO IS PRIMARILY LIABLE UPON THE CONTRACT.

HEYLYN *v.* ADAMSON.¹

IN THE COURT OF KING'S BENCH, NOV. 20TH, 1758.

[*Reported in 2 Burrows, 669.*]

The Form of the Action.—This was an action on the case, upon promises. And the first count in the declaration was upon an inland bill of exchange, drawn by Robert Carrick and directed to William Dods, dated the 13th day of March, 1756; whereby the said Robert Carrick required the said William Dods to pay to the defendant or his order 100*l.* at 40 days after date, value received, as advised by the said Robert Carrick: which said bill was indorsed by the said defendant to the said plaintiffs, and was accepted by the said Dods, but not paid by him.

Upon the trial of this cause, before Ld. Mansfield, at the sittings after the last Hilary term at Guildhall, it was proved on the part of the plaintiffs, that the said Robert Carrick made the bill; and that the defendant *indorsed it to the plaintiffs*; and that the said William Dods *accepted it*, but afterwards refused payment; and that the plaintiffs thereupon, on the day it became payable, carried it to be protested for the

¹This case is cited in Daniel on Negotiable Instruments, 669a; Norton on Bills and Notes, 155, 325, 326; Story on Bills of Exchange, 204, 381; Chitty on Bills, 520, 653, 241, 304, 339, 354, 368, 497, 521; Tiedeman on Commercial Paper, 259.

non-payment; and soon afterwards brought their action thereon, against the defendant; *but it did not appear, on the trial, that the drawer of the bill had any notice of such non-payment; or that any demand of the money was ever made on him before the commencement of the suit.*

It was thereupon objected by the defendant's counsel, "That the action would not lie against the defendant (the indorser) until a demand of payment had been made upon the drawer:" and as no such demand was proved to have been made on the drawer, the plaintiffs ought therefore to be nonsuited.

Ld. Mansfield directed a verdict to be given upon the said first count, for the plaintiffs, for 100*l.* damages and 40 shillings costs; subject to the opinion of the court, "Whether, upon this case, the plaintiffs were entitled to recover."

The only question was, Whether, in an action brought upon an inland bill of exchange, by the indorsee against an indorser, this objection, "that no evidence was given at the trial, of notice [that the bill had been dishonored] to the drawer of the bill, or even of making any inquiry after him," was a ground of non-suit?

The Claim of the Plaintiff.—The plaintiff made a distinction between inland bills of exchange, and notes of hand [promissory notes]. In the latter, the drawer is to be the payer: in the former, the drawee (the acceptor of the bill) is to pay it. So that upon a note of hand, the drawer [the maker] of the note is the first person to be resorted to, for payment: but upon an inland bill of exchange, the acceptor of the bill, not the drawer, is the first person to be resorted to, for payment; (though the drawer shall indeed stand as a collateral security for his so doing). Therefore cases upon promissory notes are not applicable to cases on inland bills of exchange. The bill holder can't come upon the drawer of the bill, till the person upon whom it is drawn shall either refuse to accept it, or refuse payment after he has once accepted it.

Every indorsement of a bill of exchange is in the nature of a new bill of exchange: and if there are several indorsers, they all undertake "that the drawee (the acceptor of the bill) shall pay it."

The indorsee is a stranger to the drawer of a bill of exchange: he is only concerned with the acceptor.

A bill of exchange may happen not to be dated from any certain place; or it may be dated from a place where the drawer does not reside; as where a traveler, calling at an inn, takes up money there, and gives a bill which is afterwards indorsed by his landlord.

And it would be vastly inconvenient to all the parties, if it should be holden necessary for the indorsee to find out or even search for the drawer of an inland bill of exchange, to give him notice "that the acceptor has refused payment." For, the security may be lost, in the interim, whilst such search is making; the indorser may break, before the indorsee may be able to find the drawer. But the indorser may know where to find him, or how to apply to him.

Six Chief Justices have been of different opinions on this point: three of them, of one opinion: three, of another.

The 9 & 10 W., 3 c., 17, was the first act that gives protests for non-payment of inland bills of exchange: and the 3 & 4 Ann. c., 9, § 4, 5, extends the protest, to the case of non-acceptance. The words of both these acts are remarkable, viz.: "That the protest shall be notified to the party from whom the bill was received; who shall repay the same with interest and charges."

The inconvenience may be the same (as to this matter) upon an inland bill, as upon a foreign bill. Yet upon a foreign bill, it certainly is not necessary.

These opinions seem to relate only to notes of hand; but upon a bill of exchange, the indorsers are all only promisors and undertakers for the payer (the acceptor) of the bill; and are not obliged to look after the original drawer. And fact and experience in business are agreeable to this position.

The Claim of the Defendant.—The defendant insisted that upon an action brought by the indorsee against an indorser of an inland bill of exchange, the plaintiff ought, at the trial, to prove notice to and demand of payment from the drawer of the bill.

The indorser is only a conditional undertaker for the drawer of the bill, who is the first contractor: he stands as a

surety only, and cannot be called upon; unless the drawer makes default. It is like the case of principal and accessory; where the accessory cannot be tried before the principal: so here the indorser cannot be liable till the original contractor has failed in performing his contract.

And great inconveniences might follow, if this was otherwise.

There are several authorities which fully prove that it is necessary.¹ Upon an action against the indorser of a promissory note, at Guildhall, C. B. Ld. Ch., J. Eyre's opinion was accordingly, "*That the plaintiff must prove diligence to get the money of the drawer; the indorser only warranting on his default.*" And for want of such proof, he directed the jury to find for the defendant. *Collins v. Butler*, at Guildhall, per Lee, Ch. J. It was ruled accordingly; who cited a case determined on great debate. Due diligence must be shown to have been used in inquiring after the drawer of the bill of exchange, before the money can be recovered against the indorser.

And there is no difference between a note of hand, and a bill of exchange; other than that the drawer of the note is the express promisor, and (as it were) both drawer and drawee; whereas on a bill of exchange, he is only an implied promisor. Indeed on a foreign bill of exchange this notice and demand is not necessary; because the foreign drawer is not amenable to justice here.

As to the words of the statutes they do not exclude the necessity of giving notice to the drawer; though they add an additional caution, "of giving notice to the person from whom the bill was received."

The Reply of the Plaintiff.—Mr. Serjeant's case, wherein mention is made of the six Chief Justices differing in opinion, seems to be taken from the 3d volume of the Abridgement of the Law.²

¹Cases in B. R. Temp. W., 3, 244, *Lambert v. Oakes*, at Guildhall; and 1 Ld. Raym., 443; *Lambert v. Oakes*, S. C., is directly in point. 1 Salk., 126 pl. 6 Anon. accordingly. *Syderbottom v. Smith*, 1 Strange, 649, M. 12 G. 1, 2 Strange, 1087.

²See New Abridgement, vol. 3, title, Merchant and Merchandise, p. 608, note b. (which is undoubtedly the same case cited by the Sergeant).

The plaintiff said, "I agree that the drawer of a bill of exchange is only a conditional undertaker for the drawee; and so also is the indorser of a bill of exchange a conditional undertaker for the drawee. But it does not follow, that the indorser of a bill of exchange is only a conditional undertaker for the drawer.

The case of *Lambert v. Oakes* was upon a note of hand (according to *Ld. Raymond*); and *Ld. Ch. J. Holt's* opinion upon a bill of exchange, was upon a case not before him.

In the case of *Hamerton v. Mackrell*, *Ld. Hardwicke*¹ held it not necessary.

The drawee's place of abode is always known upon a bill of exchange, but not the drawer's.

The court gave no opinion at the time of this argument; but postponed it, in order to settle the point with precision and certainty.

Ld. Mansfield observed, That the confusion seemed to have arisen from its not being settled, "who is the original debtor."

Mr. Justice Denison said, The case of *Hamerton v. Mackrell*, was upon a writ of error; and the judgment was affirmed, upon the allegation contained in the declaration, of a promise, made by the indorsee, which (upon a writ of error), they considered as an express promise; but *Ld. Hardwicke* did not give his own opinion at all, upon what is now the present question.

Decision.—*Ld. Mansfield* said, He could not persuade himself that there had really been such a variety of opinions upon this question, at *nisi prius*, as had been mentioned at the bar. But however that may be, it must now be determined upon the nature of the transaction, general convenience, and the authority of deliberate resolutions in court.

A bill of exchange is an order, or command, to the drawee who has, or is supposed to have, effects of the drawer in his hands, to pay. When the drawee has accepted, he is the *original debtor*; and due diligence must be used in applying

¹The Serjeant had been misinformed: for *Ld. Hardwicke* (as appears by my note of that case) did not give or even intimate his own opinion upon that point.

to him. *The drawer is only liable in default of payment by him, due diligence having been used; and therefore if the acceptor is not called upon within a reasonable time after the bill is payable, and happens to break, the drawer is not liable at all.*

Every man therefore who takes a bill of exchange, must know where to call upon the drawee; and undertakes to demand the money of him.

The Liability of Drawer and Indorser, Compared.—When that bill of exchange *is indorsed*, by the person to whom it was made payable; *as between the indorser and indorsee*, it is a *new* bill of exchange; and the indorser stands in the *place of the drawer*; the *indorsee* undertakes to demand the money of the *drawee*. If he neglects, and the drawee becomes insolvent, the loss falls upon himself. If the indorsee is diligent, and the drawee refuses payment, his *immediate remedy* is against the *indorser*; and it was very properly observed, that the act of 9, 10 W., 3, requires notice of the protest to be given “to the person *from whom the bill was received*.” He may have *another* remedy against the *first* drawer, as assignee to, and standing in the place of the indorser.

The indorsee does not trust to the credit of the original drawer; he does not know whether such a person exists, or where he lives, or whether his name may have been forged. The indorser is his drawer; and the person to whom he originally trusted, in case the drawee should not pay the money. There is no difference in this respect between foreign and inland bills of exchange, except as to the degree of inconvenience: all the arguments from law, and the nature of a transaction, are exactly the same in both cases.

As to foreign bills of exchange, the question was solemnly determined by this court, upon very satisfactory grounds, in the case of *Bromley v. Frazier*.¹ That was “An action upon the *case* upon a *foreign bill* of exchange, by the indorsee against the indorser;” and on general demurrer it was objected, “that they had *not shown a demand upon the drawer*, in

¹ 1 Strange, 441, Tr. 7 G. 1 B. R.

whose default only it is that the indorser warrants." And because "this was a point unsettled, and on which there are contradictory opinions in Salkeld, 131 and 133, the court took time to consider of it. And on second argument, they delivered their opinions, That the declaration was well enough: for, the design of the law of merchants in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie. Now to require a demand upon the drawer, will be laying such a clog upon these bills, as will deter every body from taking them. The drawer lives abroad, perhaps in the Indies, where the indorsee has no correspondent to whom he can send the bill for a demand; or if he could, yet the delay would be so great that nobody would meddle with them. Suppose it was a case of several indorsements, must the last indorsee travel round the world, before he can fix his action upon the man from whom he received the bills?

In common experience, everybody knows that the more indorsements a bill has, the greater credit it bears: whereas if those demands are all necessary to be made, it must naturally diminish the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorser warrants *only in default of the drawer*, there is no color for it; for every indorser is in the nature of a *new* drawer; and at *nisi prius*, the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring a protest for non-acceptance, is not because a protest amounts to a *demand*: for it is no more than a giving notice to the drawer to get his effects out of the hands of the drawee, who, (by the other's drawing) is supposed to have sufficient wherewith to satisfy the bill. Upon the whole, they declared themselves to be of opinion "That in the case of a foreign bill of exchange, a demand upon the drawer is not necessary to make a charge upon the indorser; but the indorsee has his liberty to resort to either for the money: consequently the plaintiff (they said) must have judgment."

Every inconvenience here suggested holds to a great degree, and every other argument holds equally, in the case of inland bills of exchange.

We are therefore all of opinion, "That to entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment of the drawee, it is not necessary to make any demand of, or inquiry after, the first drawer."

Promissory Notes and Bills of Exchange, Compared.—The law is exactly the same, and fully settled upon the analogy of promissory notes to bills of exchange; which is very clear when the point of resemblance is once fixed.

While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins: for then it is an order by the indorser, upon the maker of the note (his debtor, by the note) to pay to the indorsee. This is the very definition of a bill of exchange.

The indorser is the drawer; the maker of the note is the acceptor; and the indorsee is the person to whom it is made payable. The indorser only undertakes, in case the maker of the note does not pay.

The Duty of an Indorsee.—The indorsee is bound to apply to the maker of the note; he takes it upon that condition; and therefore must, in all cases, know who he is, and where he lives; and if after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money and cannot come upon the indorser at all.

Therefore, before *the indorsee of a promissory note* brings an action against the *indorser*, he must show a demand, or due diligence to get the money from the maker of the note; just as the person to whom the bill of exchange is made payable must show a demand, or due diligence to get the money from the acceptor, before he brings an action against the drawer. This was determined by the whole Court of Common Pleas, upon great consideration, in Pasch., 4 G., 2; as cited by my Ld. Ch. J. Lee in the case of *Collins v. Butler*.¹

¹ 2 Strange, 1087, 11 G., 2.

So that the rule is exactly the same upon promissory notes, as it is upon bills of exchange; and the confusion has, in part, arisen from the maker of a promissory note being called the drawer; whereas, by comparison to bills of exchange, the indorser is the drawer.

All the authorities, and particularly Ld. Hardwicke, in the case of *Hamerton v. Mackrell*, M., 10 G., 2 (according to my brother Denison's statement of what his Lordship said), put *promissory notes* and *inland bills of exchange* just upon the same footing:¹ and the statute expressly refers to inland bills of exchange.²

But the same law must be applied to the same reason; to the substantial resemblance between promissory notes and bills of exchange; and not to the same sound, which is equally used to describe the makers of both.

My Ld. Ch. J. Holt is quoted as being of opinion, "That in actions upon bills of exchange, it is necessary to prove a demand upon the drawer." For proof of this, the principal case referred to, is that of *Lambert v. Oakes*, reported in three books.³

In 1 Ld. Raym., 443, it appears manifestly, that the question arose upon a promissory note. "R. signed a note under his hand, payable to Oakes, or his order; Oakes indorsed it to Lambert; upon which, Lambert brought the action for the money against Oakes. Per Holt, Ch. J. He ought to prove that he had demanded or done his endeavor to demand this money of R. before he can sue Oakes upon the indorsement. The same law, if the bill was drawn upon any other person, payable to Oakes or order;" that is, "A demand must be made of the person upon whom the bill is drawn." And other parts of the case manifestly show this to have been the meaning. For, my Ld. Ch. J. Holt is reported to have said, "The indorsement will subject the indorser to an action; because it makes a new contract, in case the per-

¹ My own note of that case is exactly agreeable, viz.: "Promissory notes seem to me to be put upon the same footing as inland bills of exchange."

² V, 3, 4 Ann., c. 9.

³ 1 Ld. Raymond, 1 Salk. and 12 Mod.

son upon whom it is drawn does not pay it." Again,¹ "If the indorsee does not demand the money payable by the bill, of the person upon whom it is drawn, in convenient time, and afterwards he fails, the indorser is not liable.

In *Salkeld*,² the case is confounded: it is stated to be a bill of exchange, and "that the demand must be made upon the drawer, or him upon whom it was drawn." My Ld. Ch. J. Holt had said that a demand must be made of the maker of a promissory note, (calling him the drawer); and in the case of a bill of exchange, of him upon whom the bill is drawn. The report jumbles both together, as applied only to a bill of exchange; misled, I dare say, by the equivocal sound of the term drawer, and by the Chief Justice's reasoning in the case of a promissory note, from the law upon bills of exchange.³

In 12th Modern, 244, the case is mistaken, too; and stated as upon a bill of exchange, and as a determination "that

¹ In p. 444.

² 1 Salk., 127 (there called *Lambert v. Pack*), p. 9.

³ The report in 1 Salk., 126, p. 6, is much more strong and explicit; but it is short, anonymous, and a mere loose scrap, by the same reporter; who was manifestly unclear about the case (being S. C. with p. 9).

Presentment for Acceptance—When Necessary.—Presentment for acceptance is necessary as a general rule:

1. Where the bill is payable after sight or where it is necessary to fix the maturity of the contract;
2. Where it is made necessary by the terms of the contract.

Presentment for acceptance need not be made, when the contract is payable on demand, at sight or at a time named. *Bull v. Bank*, 115 U. S., 373; *Allen v. Suydam*, 20 Wend., 321; *Philpott v. Bryant, C. & P.*, 244.

Presentment for Acceptance—How Made.—Presentment for acceptance should be made:

1. By or on behalf of the holder (foreign bills by a notary);
2. At the place named, if there be one, or at the place of business or residence of the drawee;
3. Within a reasonable time after execution and delivery and within business or reasonable hours;
4. To the drawee or some person authorized to act for him.

If the bill is drawn upon or addressed to two or more persons (not partners), then it must be presented to each, unless one

there must be a demand upon the drawer of the bill of exchange;" and yet the report itself shows demonstrably, that what was said by my Ld. Ch. J. Holt was applied to the maker of a promissory note (calling him the drawer). For the report makes him argue—"So if the bill was drawn on

is authorized to accept or refuse acceptance for all, and then it is sufficient to present to him alone.

If the bill is drawn upon a partnership, then presentment to any member of the firm will be sufficient.

If the drawee is dead, then presentment may be made to his personal representatives.

If the drawee has been pronounced a bankrupt or has made an assignment for the benefit of creditors, presentment for acceptance may be made to him or to his assignee. *Gates v. Beecher*, 60 N. Y., 578; *Parker v. Gordon*, 8 R. I., 646; *Smith v. Bank of New South Wales*, L. R. 4 P. C., 194, 205-208; *Cheek v. Roper*, 5 Esp., 175.

Presentment for Acceptance—Excused, When.—Presentment for acceptance is excused, generally:

1. Where the drawee is dead;
2. When he has absconded;
3. Where he is a fictitious person;
4. Where he has no capacity to contract;
5. Where the presentment is irregular, but acceptance is refused upon some other ground; and
6. Where after reasonable diligence it cannot be made. *Aymar v. Beers*, 7 Cow., 705; *Daniel on Negotiable Instruments*, Sec. 478; *U. S. v. Parker*, 1 Paine, C. C., 156.

Presentment for Acceptance May be Delayed—When.—Presentment for acceptance may be delayed where after due diligence it has been prevented at the proper time and place by reason of war, sickness, inevitable accident, or other circumstances beyond the control of the holder. *Aymar v. Beers*, 7 Cow., 705; *U. S. v. Parker*, 1 Paine, C. C., 156. But in these cases presentment must be made within a reasonable time after the cause for delay is removed.

Rights of Holder When Acceptance is Refused—May Sue Immediately.—When a bill has been properly presented for acceptance, and dishonored, the holder may sue the drawer and prior indorsers immediately upon giving notice of such dishonor, without waiting to present the bill for payment. *Daniel on Negotiable Instruments*, Secs. 449, 450; *Whitehead v. Walker*, 11 L. J. Ex., 168; *Lucas v. Ladew*, 28 Mo., 342; *Pilkinton v. Woods*, 10 Ind., 432.

Effect of Acceptance.—Before acceptance the drawee is under no liability whatever unless he has contracted to accept. But by acceptance he becomes liable upon the contract to pay it

any other person, payable to Oakes or order;" which shows that the case in judgment was not a bill drawn upon another person, but payable only to Oakes, by R. himself.

It seems to me as if Ld. Ch. J. Holt, in that case, had considered the drawee of a bill of exchange in the same light as the maker of a promissory note: but loose and hasty notes, misled by identity of sound, have misapplied what was said of

according to its terms. Daniel on Nego. Inst., Sec. 451. His liability after acceptance is the same as the maker of a promissory note.

Presentment for Payment—When Necessary.—It may be stated as a general rule that presentment for payment to the drawee is a prerequisite condition to the liability of the following parties: (1) of drawers; (2) of indorsers; (3) of acceptors for honor. *Lambert v. Oakes*, 1 Ld. Ray., 443; *Heylyn v. Adamson*, 2 Burrows, 669; *Harry v. Perrit*, 1 Salk., 134; *Darrach v. Savage*, 1 Shaw, 155; *Red Oak Bank v. Orvis*, 40 Ia., 332; *Long v. Stephenson*, 72 N. Car., 569; *Borough v. Perkins*, 1 Salk., 131; *Meise v. Newman*, 76 Hun., 341; *Ranson v. Mack*, 2 Hill, 587; *Griffin v. Goff*, 12 Johnson, 423. And if there is a failure to make *presentment for payment properly*, these parties are relieved from all liability unless the presentment is excused. Presentment for payment is unnecessary in order to render the maker liable. His liability is absolute from the execution and delivery of the contract.

Presentment of Checks—Necessity Of.—Demand of payment (unless excused) must be made upon a check in order to render the drawer or indorser liable; but he cannot complain, unless by reason of the failure upon the part of the holder he has been injured and then only *pro tanto*. *Syracuse, etc. Ry. Co. v. Collins*, 1 Abb., N. C., 47; *Murray v. Judah*, 6 Cow., 484; *Greenwich, etc. Co. v. Oregon Improvement Co.*, 76 Hun., 194.

Presentment for Payment—How Made.—The presentment for payment must be made:

1. By or on behalf of the holder (if a foreign bill, by a notary);
2. At the place named if there be one, or at the place of business or residence of the drawee or maker;
3. On the day the contract legally matures;
4. At a reasonable hour on that day;
5. To the person who is primarily liable on the contract or to some one who is authorized to act for him; and
6. By exhibiting the bill to the person from whom payment is demanded. *Ocean Bank v. Williams*, 102 Mass., 141; *Lefty v. Mills*, 4 T. R., 170; *Sussex Bank v. Baldwin*, 2 Harrison (N. J.), 487; *Bank of Utica v. Smith*, 18 Johnson, 230. A custom allow-

the drawer of a promissory note, to the drawer of a bill of exchange; and to such a degree misapplied it, that two reports out of the three have stated the question as arising upon a bill of exchange; which is manifestly otherwise.

But be this conjecture as it may, we are all of opinion, "That in actions upon inland bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get the money from the drawee (or accep-

ing presentment by a notary's clerk or deputy has been held sufficient. *McClane v. Fitch*, 4 B. Mon. (Ky.), 599; *Miltenberger v. Spalding*, 33 Mo., 421; *Commercial Bank v. Varnum*, 49 N. Y., 269.

(a) *Where There are Several Drawees—Not Partners.*—If there are several drawees or makers not partners, then presentment for payment must be made to each of them. *Brit v. Lawson*, 15 Hun., 123; *Arnold v. Dresser*, 8 Allen (Mass.), 435; *Blake v. McMillen*, 33 Ia., 150; *Willis v. Green*, 5 Hill, 232; *Benedict v. Schmieg*, 13 Wash., 476; 52 Am. St. Rep., 61; *Shutts v. Fingar*, 100 N. Y., 539; 53 Am. Rep., 231; 24 Am. Rep., 161.

(b) *Where there are Several Drawees who are Partners.*—If the drawees or makers are partners, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. *Gates v. Beecher*, 60 N. Y., 518; *Brown v. Turner*, 15 Ala., 832; *Mt. Pleasant Bank v. McLaren*, 26 Ia., 306; *Greatrake v. Brown*, 2 Cranch C. C., 541; *Fourth Bank v. Heuschen*, 52 Mo., 207. The demand will also be sufficient if made on an agent of one of the firm. *Brown v. Turner*, supra.

(c) *Where the Drawee or Maker is Dead.*—If the drawee or maker is dead, and no place of payment is named, presentment for payment should be made to his personal representatives. *Magruder v. Bank of Georgetown*, 8 Curtis, 299; 3 Peters, 87; *Groth v. Gyger*, 31 Pa. St., 271. If there are no personal representatives, then presentment at the late residence of the drawee or maker. Some states permit a delay until they are appointed. *Bank of Washington v. Reynolds*, 2 Cranch C. C., 289; *Laudry v. Stansbury*, 10 La., 484.

Presentment for Payment—When Excused.—Presentment for payment to the drawee or maker is not necessary to charge a drawer or indorser:

1. Where the latter has no right to expect or believe that the contract will be honored;
2. Where the contract was made for his accommodation;
3. Where after reasonable diligence it cannot be made;
4. Where the drawee or maker is a fictitious person; and
5. Where it is expressly waived by the parties. *Coyle v. Smith*, 1 E. D. Smith, 400; *Beale v. Parish*, 20 N. Y., 407; *Little*

tor); but need not prove any demand of the drawer; and that in actions upon promissory notes, by an indorsee against the indorser, the plaintiff must prove a demand of, or due negligence to get the money from the maker of the note."

Accordingly, the rule was, That the postea be delivered to the plaintiff.

v. Phoenix Bank, 2 Hill, 425; Brush v. Barrett, 82 N. Y., 400; Cady v. Bradshaw, 116 N. Y., 188; Daniel on Neg. Instruments, Sec. 1576.

Presentment for Payment—May be Delayed When.—

Presentment for payment may be delayed:

1. Where the holder is too ill to make the presentment himself or to appoint some one to do it for him;
2. Where the contract is lost;
3. Where the mail miscarries;
4. Where by reason of war or pestilence presentment cannot be made promptly;
5. Where the death of the holder occurs before maturity and before the appointment of a personal representative; and
6. Generally whenever the delay is caused by circumstances beyond the control of the holder and not imputable to his negligence.

But in all of these cases presentment must be made with reasonable diligence after the causes of delay cease to operate. Wilson v. Senier, 14 Wis., 380; Aborn v. Bosworth, 1 R. I., 401; Smith v. Mullett, 2 Camp., 208; Bray v. Hadwen, 5 M. & S., 68; Tunno v. Lague, 2 Johnson Cas., 1; Woods v. Wilder, 43 N. Y., 164; Morgan v. Bank of Louisville, 4 Bush. (Ky.), 82; White v. Stoddard, 11 Gray, 258.

Presentment for Payment—Effect.—When a commercial contract has been properly presented for payment and dishonored, and notice of that fact given to the parties who are secondarily liable (drawers and indorsers), an immediate right of action accrues to the holder against them.

CHAPTER XIV.

Defenses to Commercial Contracts.*

SECTION 54.

A MATERIAL ALTERATION IN THE TERMS OF A COMMERCIAL CONTRACT IS A REAL DEFENSE AND MAY BE INTERPOSED AGAINST EVERY HOLDER.

MASTER *v.* MILLER.¹

IN THE COURT OF KING'S BENCH, JULY, 1791.

[*Reported in 4 Term Rep., 320; 2 H. Bla., 141.*]

The Form of the Action.—The first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel & Co. on the 20th of March, 1788, drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to Wilkinson & Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts; for money paid, laid out and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

* An alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.

¹ This case is cited in Daniel on Negotiable Instruments, 23, 148, 1373, 1373*a*, 1376, 1379, 1410; Wood's Byles on Bills and Notes, 33, 476, 483; Chitty on Bills, 182, 317, 6, 7, 8, 148, 159, 305, 560, 780; Story on Bills of Exchange, 17; Benjamin's Chalmers on Bills, Notes and Checks, 254, 256; Norton on Bills and Notes, 234, 236; Randolph on Commercial Paper, 99, 288; Tiedeman on Commercial Paper, 194, 302, 394; Ames on Bills and Notes, 434.

It stated, that Peel & Co. on the 26th of March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson & Cooke, for 974*l.* 10*s.* “Which said bill of exchange, made by the said Peel & Co. as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following, to wit:

*‘ June 23rd, 974*l.* 10*s.**

‘ Manchester, March 20, 1788.

*‘ Three months after date pay to the order of Messrs. Wilkinson & Cooke 974*l.* 10*s.* received, as advised.*

‘ Peel, Yates & Co.

‘ To Mr. Cha. Miller.

‘ 23rd June, 1788.’”

That Peel & Co: delivered the said bill to Wilkinson & Cooke, which the defendant afterwards, and before the alteration of the bill hereinafter mentioned, accepted. That Wilkinson & Cooke afterwards indorsed the said bill to the plaintiffs, for a valuable consideration before that time given and paid by them to Wilkinson & Cooke for the same. That the said bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of Wilkinson & Cooke as aforesaid, bore date on the 26th day of March, 1788, the day of making the same. And that after it so came to and whilst it remained in the hands of Wilkinson & Cooke, the said date of the said bill, without the authority or privity of the defendant, was altered by some person or persons to the jurors aforesaid unknown from the 26th day of March, 1788, to the 20th day of March, 1788. That the words “June 23rd,” at the top of the bill, were there inserted to mark that it would become due and payable on the 23rd of June next after the date; and that the alteration hereinbefore mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange, when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23rd of June and also on the 28th of June, 1788, presented to the defendant for payment; on each of which days

respectively he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill, upon which the plaintiffs declared, etc.

The Claim of Plaintiff.—For the plaintiffs it was contended, that they were entitled, notwithstanding the alteration in the bill of exchange, to recover according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th of March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part; and upon a supposed analogy between those instruments and bills of exchange. But upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills: and, if that be shown, the objection founded on the supposed analogy between them must fall with it.

The general rule respecting deeds is laid down in *Pigot's case*,¹ where most of the authorities are collected; from thence it appears that if a deed be altered in a material point even by a stranger without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction, and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party, in whose possession it was lodged, should on account of its superior authenticity be bound to preserve it entire with the strictest attention, and at the peril

¹ 11 Co., 27.

of losing the benefit of it in the case of any material alteration even by a stranger. And that he is the better enabled to do from the nature of the instrument itself, which not being of a negotiable nature is not likely to meet with any mutilation—unless through the fraud or negligence of the owner; whereas bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertance of those by whom they are negotiated, without any possibility of their being discovered by innocent indorsees, who are ignorant of the form in which they were originally drawn or accepted. And the present is a strong instance of that; for the plaintiffs cannot be said to be guilty of negligence in not inquiring how the blot came on the bill, which mere accident might have occasioned.

That the same reasons, upon which the decisions of the courts upon deeds have been grounded, will not support such judgments upon bills, will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a *profert in curiam*, unless as in *Reed v. Brookman*¹ it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is, that anciently the deed was actually brought into court for the purpose of inspection; and if, as is said in 10 Co., 92 b., the judges found that it had been rased or interlined in any material part, they adjudged it to be void. Now as that was the reason why a deed was required to be pleaded with a *profert*, and as it was never necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds, in which were erasures, were held void, because they appeared on the face of them to be suspicious.² Nor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in *Moor*, 35, p. 116, a deed which had been erased was held void although the party himself who made it had made the erasure; which was permitting a party to avail himself of his own fraud. But it is impossible to con-

¹ 3 Term. Rep., 151.

² 13 Vin. Abr. tit. Faits, 37, 38; Bro. Abr. Faits, pl. 11, referring to 44 Ed., 3, 42.

tend that the rule can be carried to the same extent as to bills; nor is it denied but that if the blot here had been made by the acceptor himself, he would still have been bound.

In Keilw., 162 it is said that if A. be bound to B. in 20*l.* and B. erase out 10*l.* all the bond is void, although it is for the advantage of the obligor, and even where an alteration in a deed was made with the consent of both the parties, still it was held to avoid it.¹

Fraud could not be the principle on which those cases were determined; whereas it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it.² And it does not abate the force of the argument, that the law is relaxed in these respects even as to deeds, for the question still remains, whether at any time bills of exchange were construed with the same rigor as deeds. The principle upon which all these cases relative to deeds was founded was, that nothing could work any alteration in a deed, except another deed of equal authenticity. And as the party, who had possession of the deed, was bound to keep it securely, it might well be presumed that any material alteration even by a stranger was with his connivance, or at least through his culpable neglect.

In many of the cases upon the alteration of deeds, the form of the issue has weighed with the court; as in 1 Rol. Rep., 40, [which is also cited in Pigot's case,³] and Michael against Scockwith,⁴ in both of which cases the alteration was after plea pleaded; and on that ground the court held that it was still to be considered as the deed of the party on *non est factum*. Now the form of the issue in actions upon deeds and those upon bills is very different; in the one case, the issue simply is, whether it is the deed of the party, which

¹ 2 Rol. Abr., 29, letter U, pl. 5.

² 2 Rol. Abr., 29, pl. 6.

³ 11 Co., 27.

⁴ Cro. El., 120.

goes to the time of the plea pleaded, as appears from the case before cited, and from 5 Co., 119 b; but here the issue is whether the defendant promised at the time of the acceptance to pay the contents. The form of the issue is upon his promise, arising by implication of law from the act of acceptance, which is found as a fact by the special verdict agreeable to the bill declared on in the second count. And in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from showing the truth of the case. Not only therefore the forms of pleading are different in the two cases, but the decisions which have been made upon deeds, from whence the rule contended for as to erasures and alterations is extracted, are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case do not exist in the other. On the contrary all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of *Minet v. Gibson*¹ goes much further than the present: for there this court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties; although such circumstances operated to establish a different contract from that which appeared upon the face of the bill itself. Whereas the evidence given in this case, and the facts found by the special verdict, are in order to show what the bill really was; which it is competent for these parties to do against whom no fraud can be imputed, if any exist. If the blot had fallen on the paper by mere accident, it cannot be pretended that it would have avoided the bill; and *non constat* upon this finding that it did not so happen. Even if felony were committed by a third person, through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party, to whom the bill is indorsed or delivered for a valuable consideration.

In *Miller v. Race*,² where a bank note had been stolen, and afterwards passed *bona fide* to the plaintiff, it was held

¹ 3 Term. R., 481; in B. R., and 1 H. Bl., 569 in Dom. Proc.

² 1 Burr., 452.

that he might recover in trover against the person who had stopped it for the real owner. And the same point was held in *Peacock v. Rhodes*,¹ where the bill was payable to order.

Again in *Price v. Neale*,² it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could not recover back the money from him. Now if it be no answer to an action upon a bill against the acceptor to show that it was a forgery in its original making by a third person's having feigned the handwriting of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not, to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases if the deed had been forged in any respect even by strangers to it; which shows that these several instruments cannot be governed by the same rules. And so little have the forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in *Russell v. Langstaffe*³ the court held, in order to get at the justice of the case, that a person, who had indorsed his name on blank checks which he had entrusted to another, was liable to an indorsee for the sums for which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn, before the indorsement.

But the case which is most immediately in point to the present is that of *Price v. Shute*;⁴ there a bill was drawn payable the 1st of January; the person upon whom it was drawn accepted it to be paid the 1st of March; the holder, upon the bill's being brought back to him, perceiving this enlarged acceptance, struck out the 1st of March and put in the 1st of January; and then sent the bill to be paid, which the acceptor refused. Whereupon the payee struck out the 1st of January and put in the 1st of March again. And in an action brought on this bill the question was, whether these alterations did

¹ Dougl., 633.

² 3 Burr., 1354.

³ Dougl., 514.

⁴ E., 33 Car., 2, in B. R.; 2 Moll, c. 10, s. 28.

not destroy it? And it was ruled they did not. This case therefore has settled the doubt; and never having been impeached, but on the contrary recognized as far as general opinion goes, by having been inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise; for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill of exchange is by the ordinary course of such transactions obliged to trust it even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment, in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents upon the same principle as governed the case of *Read v. Brookman*,¹ where it was held that pleading that a deed is lost by time and accident supersedes the necessity of a *profert*. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock v. Harris*;² for though it is expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

The Claim of the Defendant.—For the defendant it was contended, that the broad principle of law was, that any alteration of a written instrument in a material part thereof avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only, because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly re-

¹ 3 Term. R., 151.

² 3 Term. R., 174.

pugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if after being detected in the attempt, he were not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that, because they were open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds, where fraud was not so likely to be practiced. The principle laid down in Pigot's case¹ is not disputed, as applied to deeds. But the first answer attempted to be given is, that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this it is sufficient to say that no such reason is suggested in any of the books: but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given.

Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense; the substance of the issue in both cases is, whether in point of law the party be liable to answer upon the instrument declared on; and therefore any matter which either avoids it *ab initio*, or goes in discharge of it, may be shown as much in the one case as in the other. Upon *non est factum* the question is, whether in law the deed produced in evidence be the deed of the party; so on *non assumpsit* the question is, whether the bill given in evidence be in point of law the bill accepted by the defendant; because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now neither of the counts in the declaration was proved by the facts found. For in the first count the bill was dated the 20th of March; but as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither can

¹ 11 Co., 27.

they recover on the second, because though it is found that he accepted a bill dated the 26th of March, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count.

With respect to the cases cited of bills of exchange having been always construed by the most liberal principles, and particularly in the case of *Minet v. Gibson*, the same answer may be given to all of them, which is, that so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party, who, in the latter case particularly, endeavored by a trick to evade the contract. Whereas here the contract has been substantially altered by the parties who endeavor to enforce it; or at least by those whom they represent, and from whom they derive title.

Then the case in *Molloy of Price v. Shute* is chiefly relied on by the plaintiffs, to which several answers may be given. First, the authenticity of it may be questioned; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill, as originally drawn, was not altered upon the face of it; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then if this bill be void for this fraud, no evidence could be given to prove its contents, as in the case of a deed lost; because in that there is no fraud. But even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts, if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration,

upon which ground the case of *Tatlock v. Harris*¹ was decided.

In reply it was urged, that the issue was not whether the defendant had accepted this bill in the state in which it was shown to the jury; but whether he had promised to pay in consequence of having accepted a bill dated the 26th March, drawn by, etc., and those facts being found, the promise necessarily arises. It is said that the policy of the law will extend the same rule to the avoidance of bills of exchange, which have been altered, as to deeds; because there is even greater reason to guard against fraudulent alterations in the former than in the latter case. To which it may be answered, that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed: and it is admitted, that if the blot had been made by accident, it would not have avoided the bill; and nothing is stated to show that it was not done by accident. Besides, the policy of the law is equally urgent in favor of the plaintiffs, it being equally politic to compel a performance of honest engagements.

Here the defendant is only required to do that which in fact and in law he has promised to do. And if he be not liable on this contract, he will be protected in withholding payment of that money which he has received, and which by the nature of his engagement he undertook to repay.

No answer has been given to the case cited from *Molloy*: for though the case is not reported in any other book, it bears every mark of authenticity, by noting the names of the parties, the court in which it was determined, and the time of the decision; and it has been adopted by subsequent writers on the same subject. Again, the alteration there was fully as important as this, for it equally tended to accelerate the day of payment; and, lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor; which is an admission that the policy of the law does not attach so as to avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

¹ 3 Term R., 174.

Decision.—The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument. For the instrument is the only means by which they can derive a right of action. The right of action, which subsisted in favor of Wilkinson & Cooke, could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited on one side or the other, except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar, which, in point of law as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why in point of policy would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offense was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in possession of Wilkinson & Cooke, who were then entitled to the amount of it, and from whom the plaintiffs derive title: and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance.

The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state

of affairs: but they establish this principle, that all written instruments, which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened.

It was doubted so lately as in the reign of George the First, in Ward's case,¹ whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds; and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from Molloy indeed at first made a different impression on my mind: but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party, to whom it was directed, accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case: not an iota of the bill itself was altered; but on the person, to whom the bill was directed, refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least, that none is found: but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases, where the seal of the deed was torn off by an infant. With respect to the argument drawn from the

¹ 2 Str., 747; 2 Ld. Raym., 1461.

form of the plea, it goes the length of saying, that a defendant is liable, on *non assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment: but the question is, whether or not the defendant promised in the form stated in the declaration; and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange dated the 20th of March; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March; but the defendant objects to the plaintiff's recovering on this count also, because, the bill having been altered while it was in the hands of Wilkinson & Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is that the plaintiff's right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular choses in action to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson & Cooke to them, and that this was the bill which was presented when it became due. Now has all this been proved? The bill was drawn on the 26th of March, payable at three months date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date was altered; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days; according to that alteration, the payment was demanded on the 23d of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by

Peel & Co. and accepted by the defendant; and here the cases which were cited at the bar apply. Piggott's is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and, secondly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds: but it is said that that law does not extend to the case of a bill of exchange: whether it does or not must depend on the principle on which this law is founded.

The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that

The General Classes of Defenses.—The defenses to commercial contracts have been divided into two general classes:—(1) real and (2) personal.

A Real Defense—Defined.—The first or a real defense may be defined to be one which attaches to the contract and virtually destroys it so that it cannot be enforced against any of the parties to it nor in favor of any holder. Among the real defenses may be named:

1. *Incapacity of the parties*, such as infancy, coverature, insanity;
2. *Illegality of the contract*, as where it contravenes (1) the statute, or (2) the common law, or (3) public policy—such as usury, gaming or where notes or bills are given for the purchase of intoxicating liquors in jurisdictions where their sale is prohibited;
3. Where by the acts of the parties the contract has either been *cancelled*, or *altered in a material way*; and
4. Want of delivery.

A Personal Defense—Defined.—A personal defense may be defined to be a defense which attaches not to the contract itself, but to the agreement or conduct of the parties in regard to the instrument and which renders it inequitable for the holder to enforce it as between the immediate parties. It is called a personal defense because it is available as a defense only between the parties

it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. *A deed is nothing more than an instrument or agreement under seal*: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favor it is made, from attempting to make any alteration in it. This principle too appears to me as applicable to one kind of instruments as to another.

It has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 110*l.*, and after acceptance the sum was altered to 1,000*l.*: it is not pretended that the acceptor shall be liable to pay the 1,000*l.*; and I say that he cannot be compelled to pay the 100*l.* according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it

and privies to the immediate contract. Parties are known as immediate and mediate. Immediate parties are the parties to the contract, as the maker and payee; the indorser and his indorsee. Mediate parties are parties between whom there are other parties, as maker and indorsee; first indorser and second indorsee.

Among the personal defenses may be named:—(a) payment; (b) release; (c) accord and satisfaction; (d) failure of consideration; (e) fraud; (f) duress; (g) illegality, (whereby the statute, or common law or public policy, the act is pronounced illegal, but not void).

Material Alteration—Defined.—A material alteration in a commercial contract is one which changes the legal relation of the parties or their obligations, or the legal effect of such contract. It is “an alteration which causes the contract to speak a language different in legal effect from that which it originally spoke.” *Johnston v. May*, 76 Ind., 293; *Osborne v. Van Houton*, 45 Mich., 444; *Burlingame v. Brewster*, 79 Ill., 515; *Rowley v. Jewett*, 56 Ia., 492; *Bank v. Douglass*, 31 Conn., 170, 181; *Gardner v. Walsh*, 5 El. & Bl., 83; *Lunt v. Silver*, 5 Mo. app., 186; *Horn v. Newton City Bk.*, 32 Kan., 518; *Gettysburg Bk. v. Chisolm*, 169 Pa. St., 564, 569; *Wait v. Pomeroy*, 20 Mich., 425; *Sullivan v. Rudisill*, 63 Ia., 158. An alteration to correct a mistake is not material; *Evans v. Foreman*, 60 Mo., 449; *Derby v. Thrall*, 44

would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that Piggott's case only shows to what time the issue relates: but it goes further, and shows, that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the court will inquire to what time the issue relates in both cases. Then to what does the issue relate here? The plaintiffs in this case undertook to prove everything that would support the assumpsit in law, otherwise the assumpsit did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused: but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay another instrument; and therefore the plaintiffs failed in proving a necessary averment in their declaration.

If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might

Vt., 413; see contra, *Newman v. King*, 54 Ohio St., 273. Whether the alteration is material is a question of law.

Material Alteration—Effect of.—“We understand the law to be well settled that a material alteration of a promissory note by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration; and this without regard to whether the alteration is apparently or presumably to the benefit or detriment of the parties objecting. Courts cannot undertake to say that a party would have made the contract as altered, and thus make it for him, merely because its terms are more favorable to him than those embodied in the original instrument, any more than a like conclusion could be justified where the alteration imports additional liability. In the one case no less than in the other the altered paper is not the contract which the party has made; and in neither case can the courts declare it to be his contract, or enforce it as such. The law proceeds on the idea that the identity of the contract has been destroyed; that the contract made is not the contract before the court; that the party did not make the contract which is before the court; and, so adjudging, it cannot go further, and hold him bound by it, on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement because it involved less

have been like the case mentioned at the bar. It was contended at the bar, that the inquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance: but granting that he did so promise, that alone will not make him liable unless that same bill were afterwards presented to him. I will not repeat the observations which have already been made by my Lord on the case in Molloy: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this court: it only appears that there was a point made at *nisi prius*, but not that it was afterwards argued here. But it has been said that a decision in favor of the plaintiffs will be the most convenient one for the commercial world: but that is much to be doubted; for if, after an alteration of this kind, it be competent to the court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud.

liability than the original and only paper executed by him. There are some expressions in the books to the contrary." *Montgomery v. Crossthwait*, 90 Ala., 553; *Illustrative Cases*, 154; *Masters v. Miller*, *supra*.

Material Alteration by a Stranger—Effect of.—Upon the question whether an alteration is ever material or not when made by a stranger, there is a different rule in the U. S. and England. In England a material alteration by a stranger destroys the title of the holder. *Davidson v. Cooper*, 11 M. & W., 778; 13 M. & W., 343. While in the United States such an alteration is treated as a spoliation simply. *Drum v. Drum*, 133 Mass., 566; *Colson v. Arnot*, 57 N. Y., 253; *Neff v. Horner*, 63 Pa. St., 237; *Piersol v. Grimes*, 30 Ind., 129; *Fullerton v. Sturges*, 4 Ohio St., 529; *Bigelow v. Stilphen*, 35 Vt., 521.

Material Alterations—Illustrations of.—The following changes in commercial contracts have been held to be material:

1. Changing a joint to a joint and several contract;
2. Changing the date or time of payment;
3. Changing the place of payment;
4. Changing the rate of interest;
5. Adding interest when it did not draw interest;
6. Substituting a new payee;

Great and mischievous neglects have already crept into these transactions; and I conceive, that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with good effects, and cannot be productive of any bad consequences, because the party who has a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

Judgment for the defendant.¹

¹This judgment was afterwards affirmed in the Exchequer-Chamber. 5 Term Rep., 367.

7. Adding a seal;
8. Adding a subscribing witness;
9. Adding or removing a signature;
10. Adding words of negotiability when it was not negotiable;
11. Adding a special consideration after "value received";
12. Adding a place of payment when none is named;
13. Changing a material memorandum;
14. Changing the medium of payment. Daniel on Neg. Inst., secs. 1373-1404 and cases cited; Cape Ann Nat. Bk. v. Burns, 129 Mass., 596; Angle v. Northwestern Ins. Co., 92 U. S., 330.

Immaterial Alterations — Illustrations.—The following changes or alterations in commercial contracts have been held to be immaterial:

1. Changing a bill payable to "A" or bearer to "A" or order or bearer;
2. Changing an indorsement in blank into a special indorsement;
3. Adding the legal rate of interest where the note reads "with interest" simply.

CHAPTER XV.

Defenses.—Alteration.—Negligence.

SECTION 55.

WHENEVER THE MAKER OF A COMMERCIAL CONTRACT, BY HIS OWN CARELESSNESS OR NEGLIGENCE, EXECUTES AND DELIVERS IT SO THAT MATERIAL ALTERATIONS MAY BE MADE, IN A WAY WHICH DOES NOT EXCITE THE SUSPICION OF CAREFUL AND PRUDENT BUSINESS MEN, HE WILL BE HELD LIABLE THEREON TO ANY BONA FIDE HOLDER. NEGLIGENCE, HOWEVER, IS A QUESTION OF FACT.

BROWN *v.* REED.¹

IN THE SUPREME COURT OF PENNSYLVANIA, OCT., 1875.

[*Reported in 79 Pa. St., 370.*]

The Form of Action.—This was an action of assumpsit brought January 31st, 1873, by W. W. Reed against T. H. Brown, upon the following note:

“North East, April 3rd, 1872.

“Six months after date I promise to pay to J. B. Smith or order two hundred and fifty dollars for value received, with legal interest, without defalcation or stay of execution. T. H. Brown.”

Indorsed *“J. B. Smith, without recourse.”*

¹This case is cited in Benjamin's Chalmers, on Bills, Notes and Checks, 257; Bigelow on Bills and Notes, 187, 195; Wood's Byles on Bills and Notes, 481, 589; Tiedeman on Commercial Paper, 397; Ames on Bills and Notes, 598; Daniel on Negotiable Instruments, 1405, 1409; Norton on Bills and Notes, 239. See leading cases upon this question: Young *v.* Grote, 4 Bing., 253; 12 Moore, 484; Phelan *v.* Moss, 17 P. F. Smith (Pa.), 59; Johnson Harvester Co. *v.* McLean, 57 Wis., 258; 46 Am. Rep., 39; Garrard *v.* Lewis, 47 L. T. Rep. (N. S.), 408; Lowden *v.* National Bank, 38 Kan., 533.

The plaintiff gave the note in evidence, and testified that he had bought it from the payee for \$220, which he paid in cash. He testified further that he had received the note *bona fide*, and rested.

The defendant then offered to prove:

“That the paper he signed has been altered since so signed, without his knowledge or consent, and that it was obtained from him by fraud of the payee; also, to show what took place between Smith, the payee, and himself at the time the note was made; also, to show that the paper in suit is but the part of an agreement entered into between himself and one J. B. Smith, purporting to constitute the defendant an agent to sell ‘Hay and Harvest Grinders’ in North East and Harbor Creek townships, in the county of Erie, and that the paper making him such agent, has since it was signed by him, been cut in two without his knowledge or consent, so as to make the part in evidence read as a promissory note for \$250, and that a large part of the original instrument was cut off, and that the paper in suit is not the whole of the paper signed by defendant, nor in the shape in which he signed it, but when signed by him was as follows, to wit:

*

North East, April 2d, 1872.

“Six months after date I promise to pay J. B. Smith or bearer fifty dollars when I sell by order TWO HUNDRED AND FIFTY DOLLARS worth of Hay and Harvest Grinders, for value received, with legal interest, without appeal, and also without defalcation or stay of execution.

T. H. Brown, Agent for Hay & Harvest Grinders.”

*

The plaintiff objected to the offer, because, admitting it all to be true, it did not constitute a defence to the note in the hands of an innocent purchaser for value, before maturity, and it was not alleged that the plaintiff is not such a purchaser; nor that there was any guilty knowledge on part of the plaintiff in this case before purchase of the paper.

[The paper was divided by cutting through between where the asterisks are placed.]

The offer was rejected and a bill of exceptions sealed for the defendant.

The court charged:—

“There is no evidence impeaching this paper as a note in the hands of the plaintiff and your verdict therefore must be for the plaintiff for the amount of note and interest.”

The verdict was for the plaintiff for \$280.54.

The defendant took a writ of error, and assigned the rejection of his offer of evidence and the charge of the court, for error.

The Claim of the Plaintiff in Error (Defendant below).—The defendant contended that a note once issued and then altered is void altogether.¹ Cutting the contract into two pieces rendered the whole contract, and hence the part held by the plaintiff, absolutely void as against maker.²

The Claim of the Defendant in Error (Plaintiff below).—The defendant in error, cited the following cases in support of the decision of the court below and closed: Phelan v. Moss,³ and Garrard v. Haddan.⁴

Decision.—The learned counsel for the plaintiff in error has appealed to us to reconsider and overrule Phelan v. Moss.⁵ We mean, however, to adhere to those cases, as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is that, *if the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a bona fide holder who takes it in the usual course of business, before maturity. The maker*

¹ Masters v. Miller, 4 Term Rep., 320, 346; Fay v. Smith, 1 Allen, 477; Wade v. Wittington, Id., 561; Coch v Coxwell, 2 C., M. & R., 291; Smith's Lead. Cas., 934.

² 2 Parsons Notes and Bills, 580-2; Chitty on Bills, 182; Wheelock v. Freeman, 13 Pick., 165; Wade v. Wittington, 1 Allen, 561; Fay v. Smith, Id., 477; Bruce v. Barber, 3 Barb., 374; Deny v. Reed, 40 Id., 16; Nazro v. Fuller, 24 Wend., 37; Warring v. Early, 2 El. & B., 763; Stephens v. Graham, 7 S. & R., 505; Jardine v. Payne, 1 B. & Ad., 671; Benedict v. Cowden, 49 N. Y., 396; Story on Notes, Sec. 408; Byles on Bills, Secs. 254, 256.

³ 17 P. F. Smith (Pa.), 59.

⁴ Id., 82; Zimmerman v. Rote, 25 P. F. Smith (Pa.), 188.

⁵ 17 P. F. Smith (Pa.), 59; and Garrard v. Haddan, Id., 82; since followed in Zimmerman v. Rote, 25 P. F. Smith (Pa.), 188.

ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skillful that alteration might be provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skillful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court in *Zimmerman v. Rote*.¹ "It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection."

But would the facts offered to be given in evidence and rejected by the court below, have brought this case within the line of their decisions? We think not. In *Phelan v. Moss* and in *Zimmerman v. Rote*, the party signed a perfect promissory note, on the margin or underneath which was written a condition which as between the parties was a part of the contract and destroyed its negotiability. But it could easily be separated, leaving the note perfect, and no one would have any reason to suspect that it had ever existed. In *Garrard v. Haddan* the note was executed with a blank, by which the amount might be increased, without any score to guard against such an alteration. In all these cases the defendants put their names to what were on their face promissory negotiable notes. In the case before us on the defendant's offer, he did not sign a promissory note, but a contract by which he was to become an agent for the sale of a washing machine. It was indeed so cunningly framed that it might be cut in two parts, one of which with the maker's name would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct and given the instrument so unusual an appearance as ought to have arrested

¹25 P. F. Smith (Pa.), 191.

the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. The ink of a writing may be extracted by a chemical process, so that it is impossible for any but an expert to detect it, but surely in such a case it cannot be pretended that the holder can rely upon his good faith and diligence. We think then that the evidence offered by the defendant below should have been received.

Judgment reversed and *venire facia de novo* awarded.

Alterations—Negligence of Maker.—If the maker, by his negligence, should execute a commercial contract as follows:

“\$ 50.00. “ *Ann Arbor, Mich., Aug. 25, 1898.*
 “ *Two months after date without grace I promise to pay to*
the order of John Doe..... Fifty
Dollars at the Ann Arbor Savings Bank, for value re-
ceived, with eight per cent annual interest after due.
Richard Roe.”

And a subsequent holder should write “10” in the margin before “50” and “Ten hundred and” before “fifty” in the body of the note in a way which would not excite the suspicion of careful men, he would be liable to any *bona fide* holder for the sum of Ten hundred and fifty dollars. *Garrard v. Haddan*, 67 Pa. St., 82; *Johnson Harvester Co. v. McLean*, 57 Wis., 258; *Yocum v. Smith*, 63 Ill., 321; *Vischer v. Webster*, 8 Cal., 109.

This doctrine however is denied in some jurisdictions. *Greenfield Savings Bank v. Stowell*, 123 Mass., 203. In this case the figure “4” was inserted before “67” in the margin, and the phrase “four hundred and” before “sixty seven” in the body of the contract. In this case however the “alteration” was made by the principal party to the contract which no doubt had much to do with the opinion. See also *Holmes v. Trumper*, 22 Mich., 427; *Washington, etc. Bank v. Ekey*, 51 Mo., 273; *Cape Ann Nat. Bk. v. Burns*, 129 Mass., 596; *Angle v. Northwestern Ins. Co.*, 92 U. S., 330; *McGrath v. Clark*, 56 N. Y., 34; *Noll v. Smith*, 64 Ind., 511. See also *Scofield v. Ford*, 56 Ia., 370; *Stephens v. Davis*, 85 Tenn., 271; *Seibel v. Vaughn*, 69 Ill., 257.

CHAPTER XVI.

Defenses—Fraud.

SECTION 56.

FRAUD MAY BE EITHER A REAL OR A PERSONAL DEFENSE. IT MAY ALWAYS BE INTERPOSED BETWEEN IMMEDIATE PARTIES, AND IF IT CAUSED THE PARTIES TO ENTER INTO THE CONTRACTUAL RELATIONS UNDER A MISAPPREHENSION OF THE REAL NATURE OF THE CONTRACT, WITH THE EXERCISE OF DUE DILIGENCE, THEN IT IS A REAL DEFENSE AND MAY BE INTERPOSED AGAINST ANY HOLDER.

FOSTER *v.* MACKINNON.¹

IN THE COURT OF COMMON PLEAS, JULY, 1869.

[*Reported in 4 Common Pleas, 704.*]

The Form of Action.—Action by indorsee against indorser on a bill of exchange for 3000*l.* drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud.

The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

¹ This case is cited in Daniel on Negotiable Instruments, 850; Benjamin's Chalmers, on Bills, Notes and Checks, 58, 220; Norton on Bills and Notes, 253; Wood's Byles, on Bills and Notes, 487, 589; Randolph on Commercial Paper, 284; Bigelow on Bills and Notes, 37, 176, 180; Ames on Bills and Notes, 540.

The cause was tried before Bovill, C. J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his hand-writing, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances: Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested, and the defendant had some time previously, at Callow's request, signed a guarantee for 3000/., in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him that it was a guarantee; whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill immediately after that of Cooper. Callow only showed the defendant the back of the paper: it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

The jury returned a verdict for the defendant.

The Claim of Defendant.—Two questions arise here:—

1. Whether there was any negligence on the part of the defendant in signing the document as he did; and

2. Whether, assuming Callow's evidence to be true, the defendant can be responsible upon an indorsement so fraudulently obtained.

In considering the first of these questions, regard must be had to the age and condition of the party. What would be negligence in a merchant or a banker would not necessarily be negligence on the part of a gentleman of great age and impaired physical powers. Negligence must in all cases be a relative term.¹ Then, as to the second question. It is essential to every contract that there be volition. A man cannot be said to contract when he signs a paper upon a representation and under a belief that he is signing something different from that which it turns out to be; to make a valid and binding contract, the mind must go with the act. This arises upon the traverse of the indorsement. Upon the facts proved, the defendant cannot be said to have indorsed the bill at all.

Where a man puts his name as acceptor or indorser on a blank stamp, he becomes responsible, if the bill is afterwards filled up and gets into the hands of a *bona fide* holder for value, to the full amount which the stamp will cover,² but in such case he intends to become a party to the bill. All the cases in which one who has been defrauded has been held liable upon the bill or note are explainable on the ground of agency.³ *Young v. Grote*,⁴ may be sustained on that ground.⁵ But the fact of agency must be first established.⁶ In *Ingham v. Primrose*,⁷ the defendant had once made a complete bill, and the ground of the decision was that he had negligently omitted to cancel or destroy it effectually.

The Claim of Plaintiff.—The fact that the defendant's indorsement on the bill was obtained by a fraudulent repre-

¹ *Lynch v. Nurdin*, 1 Q. B., 29 (E. C. L. R., vol. 41).

² *Russell v. Langstaffe*, *Montague v. Perkins*, 2 Doug., 514; 22 L. J. C. P., 187; *Byles on Bills*, 9th ed., 181.

³ *Byles on Bills*, 9th ed., 131.

⁴ 4 Bing., 253 (E. C. L. R., vol. 13), 12 Mo., 484.

⁵ See the observations upon that case of Parke, B., in *Robarts v. Tucker*, 16 Q. B., 560 (E. C. L. R., vol. 71); of Williams, J., in *Ex parte Swan*, 7 C. B. N. S., 445 (E. C. L. R., vol. 97); and of Blackburn, J., in *Gum v. Tyrie*, 4 B. & S., 680, 713 (E. C. L., vol. 116).

⁶ *Awde v. Dixon*, 6 Ex., 869; *Kingsford v. Merry*, 11 Ex., 577, in error, 1 H. & N., 503.

⁷ 7 C. B. N. S., 82 (E. C. L. R., vol. 97), 28 L. J. C. P., 294.

sentation that he was signing something else, is no answer to the claim of a *bona fide* holder for value, without notice of the fraud. *No doubt, as a general rule, fraud vitiates all contracts. But a bill of exchange is not in the ordinary sense of the word a contract at all.* The law-merchant imposes certain obligations on parties who put their names on bills of exchange,—obligations altogether apart from the ordinary obligations arising out of other contracts. Bills of exchange now form an important part of the currency of the country. No matter how a bill or note may be tainted with fraud, or even if it had been obtained by duress or by felony, that is no answer to an action at the suit of a *bona fide* holder for value:¹ Parsons on Bills, ed. 1865, pp. 109–115, citing amongst other cases, Putnam v. Sullivan,² where Parsons, C. J., says: “The counsel for the defendants agree that generally an endorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which the distinction ought to prevail; as, where a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others.”

In Rex v. Hales,³ the prisoner had got from a member of parliament named Gibson a blank frank, which he subsequently, by writing over the signature and altering the word “free” into “for” and adding “myself and partners” turned into a promissory note for 2,600*l.*; and, though the most eminent counsel of the day were retained to defend him, it

¹ Bayley on Bills, 472, 473, 534; Chitty on Bills, 10th ed., 50, 53, 178; Byles on Bills, 8th ed., 57; Duncan v. Scott, 1 Camp., 100; Marston v. Allen, 8 M. & W., 494; Harvey v. Towers, 6 Ex., 656.

² 4 Massachusetts Rep., 45.

³ 17 How. St. Tr., 161.

did not occur to any of them that the then necessary allegation in the indictment of the intent to defraud Gibson failed in proof, which it would have done if the argument urged here is well founded, viz., that Gibson was not liable on the note, and therefore could not be defrauded. So, in *Rex v. Revett*, Byles on Bills,¹ A. by false representations induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 100*l.* upon it. A. was indicted for defrauding C.; and it was held that C. had his remedy against B. on the note, and that the fraud therefore not being upon C. but upon B., the indictment was not sustained by the evidence. Wherever there is consideration, fraud may be disregarded. If a stolen bill gets into circulation, the acceptor is liable at the suit of a *bona fide* holder for value.² This was not a case of forgery: it was a mere fraudulent procurement of the defendant's signature to a genuine and a complete bill. *Thoroughgood's Case*,³ is peculiar, and not very intelligible; and in the case cited from Keilway, 76*b*, the deed was fraudulently read by the grantee himself.

Decision.—*Nance v. Lary*,⁴ also cited in *Parsons on Bills*, 114, seems to be very much to the purpose. In that case, the defendant and one Langford being about to execute a bond in blank, the latter produced a sheet of paper, upon which the defendant signed his name; whereupon Langford suggested that the signature was so far from the bottom of the paper that there might not be room for the bond to be written above it, and produced another sheet for the defendant to sign so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had been or would be destroyed. Subsequently, Langford caused the note upon

¹8th ed., 124.

²*Ingham v. Primrose*, 7 C. B. N. S., 82, 85 (E. C. L. R., vol. 97), 28 L. J. C. P., 294. *Awde v. Dixon*, 6 Ex., 869, is like *Stagg v. Elliott*, 12 C. B. N. S., 373 (E. C. L. R., vol. 104).

³2 Co. Rep., 9*b*.

⁴5 Alabama Rep., 370.

which the present suit was brought to be written over the blank signature of the defendant retained by him, and negotiated it to the plaintiff. Collier, C. J., said: "The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."

In that case the defendant never intended to sign the instrument at all. Byles, J., in his judgment in *Swan v. North British Australasian Company*,¹ in the Exchequer Chamber says: "The object of the law merchant as to bills and notes made or become payable to bearer is, to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction, being a forgery, would in ordinary cases convey no title), may give us a good title to any sum fraudulently inscribed, within the limits of the stamp, and in America, where there are no stamp-laws, to any sum whatever. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value: the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay."

If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign.

Then, the verdict was clearly against the weight of evidence upon the question of negligence. Can it be said that it was any other than gross negligence on the part of the de-

¹ 2 H. & C., 184.

fendant to put his name upon the back of a document such as that described, without even looking at the face of it. If any one is to suffer from his misplaced confidence in Callow, it surely must be the defendant himself.

Byles, J., said: "This was an action by the plaintiff as indorsee of a bill of exchange for 3000*l.*, against the defendant, as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guarantee. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he the defendant (as the witness stated) believing the document to be a guarantee only.

The Lord Chief Justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A new trial was obtained, *first*, on the ground of misdirection in the latter part of the summing-up, and *secondly*, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the

contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In *Thoroughgood's*¹ it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to *Thoroughgood's Case*, in Fraser's edition of *Coke's Reports*, it is suggested that the doctrine is not confined to the condition of an illiterate grantor; and a case in *Keilway's Reports*² is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor was lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see *Com. Dig. Fait* (B. 2), and is recognized by Bayley, B., and the Court of Exchequer, in the case of *Edwards v. Brown*.³ Ac-

¹ Case 2 Co. Rep., 9 b.

² Keilw., 70, p. 6.

³ 1 C. & J., 312.

cordingly, it has recently been decided in the Exchequer Chamber, that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor; *Swan v. North British Australasian Land Company*.¹

These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill, stamps and parts with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor

¹ 2 H. & C., 175.

Fraud—Personal Defense, Generally.—As a general rule fraud is a personal defense and can therefore be interposed between immediate parties only. *Jackson v. Henry*, 10 Johnson, 184. If the bill or note gets into the hands of a subsequent party for value without notice, he can recover. A contract affected by fraud is voidable not void. The party making a negotiable contract induced by fraud may rescind it and treat it as though it had never been made; but he must do this before it comes into the hands of a *bona fide* holder. *Page v. Krekey*, 137 N. Y., 313; *National Bk. v. Veneman*, 43 Hun., 241; *Clark v. Pease*, 41 N. H., 414; *Soudheim v. Gilbert*, 117 Ind., 71; *Walker v. Ebert*, 29 Wis., 194; *Chapman v. Rose*, 56 N. Y., 137; *Douglas v. Matting*, 29 Ia., 498; *Lewis v. Clay*, 42 Solicitor's Journal, 151.

Fraud.—"Bohemian Oats" Notes.—"Bohemian Oats" or "Red Line" wheat, contracts have been enforced in some states while in others they have not. In Ohio and Iowa they have been enforced when in the hands of subsequent *bona fide* holders. In Michigan the right of the holder to recover was denied upon the ground of public policy. *Sutton v. Beckwith*, 68 Mich., 303 (1888); *McNamara v. Gargett*, 68 Mich., 454; *Hanks v. Brown*,

intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order of admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to

79 Ia., 560; Merrill v. Packer, 80 Ia., 542; Payne v. Raubinek, 82 Ia., 587; Kitchen v. Loudenback, 48 Ohio St., 177; Jacobs v. Mitchell, 46 Ohio St.; 22 Ohio Law J., 388; Hess v. Culver, (Mich.), 43 N. W. Rep., 994; Davis v. Seely, 71 Mich.

Fraud—Rights of Bona Fide Holder.—The general rule is well settled that one who acquires a commercial contract, without notice of existing equities, in the usual course of business, for a valuable consideration and before maturity, takes it unaffected by fraud in its origin. Swift v. Tyson, 16 Pet., 1; Selser v. Brock, 3 Ohio St., 302; Gridley v. Bane, 57 Ill., 529; Clapp v. County of Cedar, 5 Ia., 15; 68 Am. Dec., 678; Wayne Agricultural Co. v. Cardwell, 73 Ind., 535; Brown v. Spofford, 95 U. S., 474; Burrill v. Parsons, 71 Me., 282.

Fraud—Statutory Provisions Relating to.—The question, whether fraud shall effect the validity of a negotiable contract has been the subject of statutory regulations in some of the states. In Georgia it is provided that a *bona fide* holder shall be protected from the defenses of fraud. Merritt v. Bagwell, 70 Ga., 578.

In Illinois, however, it is provided by statute that "if any fraud or circumvention be used in obtaining the making or executing of any note it shall be void (not voidable). Hewitt v. Jones, 72 Ill., 218. It is well to observe here that the "fraud" used "in

a forgery. In that case, the signer would not have been bound by his signature, for two reasons,—first, that he never in fact signed the writing declared on,—and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of *Ingham v. Primrose*,¹ and the case of *Nance v. Lary*,² cited in 1 *Parsons on Bills* 111n, both cited by the plaintiff, the facts were very different from those of the case before us, and have but a remote bearing on the question. But, in *Putnam v.*

¹ 7 C. B. N. S., 83 (E. C. L. R., vol. 97), 28 L. J. C. P., 294.

² 5 Alabama, 370.

obtaining the making or executing" does not apply to the consideration upon which the note was given. *Culver v. Hide and Leather Bank*, 78 Ill., 625; *Taylor v. Thompson*, 3 Ill. App., 109; *Anten v. Gruner*, 90 Ill., 300. "It must be borne in mind" says Walker, C. J., "that the fraud or covin must relate to the obtaining of the instrument itself, and not to the consideration upon which it is based. It is not fraud which relates to the quality, quantity, value, or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is an other of a different character; such as giving a note or other agreement for one sum or thing, when it is for another sum or thing; or as giving a note under the belief that it is a receipt." *Latham v. Smith*, 45 Ill., 25, 27.

Where the Delivery of the Contract is Obtained Through Fraud.—Delivery of a bill or note is a prerequisite to its existence as a contract. If therefore its possession is obtained through fraud the payee cannot maintain any action thereon. *Burson v. Huntington*, 21 Mich., 415; 4 Am. Dec., 407; *Kinyon v. Wohlford*, 17 Minn., 239; 10 Am. Rep., 165; *Clarke v. Johnson*, 54 Ill., 296; *Hall v. Wilson*, 16 Barb., 548; *Cline v. Guthrie*, 42 Ind., 227; 13 Am. Rep., 357. In this last case a man signed his name upon a blank piece of paper, and subsequently a promissory

Sullivan, an American case,¹ and cited in Parsons on Bills of Exchange,² a distinction is taken by Ch. J. Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note and for a different purpose. And the court intimated an opinion that, even in such a case as that, a distinction might prevail and protect the indorsee.

The distinction in the case now under consideration is a much plainer one; for, on this branch of the rule, we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.

¹ 4 Mass., 45.

² Vol. i., p. 111n.

note was written over it. It was held that he was not liable thereon for the reason that no delivery of a note was ever made. See also Ingram v. Primrose, 7 Conn. (N. S.), 82; Nance v. Lary, 5 Ala., 370; Caulkins v. Whisler, 29 Iowa, 495; 4 Am. Rep., 236.

Notes Obtained in Blank and Wrongfully Filled up.—The rule is well settled that where a person executes a commercial contract in blank, and entrusts it to an other that the former is liable according to its completed terms, if the same gets into the hands of a *bona fide* holder. Russell v. Langstaffe, 2 Doug., 514; Bank of Pittsburgh v. Neal, 22 How. Pa., 107; Erchelberger v. Old Nat. Bank, 103 Ind., 401; Fullerton v. Sturgis, 4 Ohio St., 529. Ld. Mansfield said “that an indorsement on a blank note is a letter of credit for an indefinite sum. As between the original parties of course no recovery can be had contrary to the agreement.” McCoy v. Lockwood, 71 Ind., 319; Bedell v. Herring, 11 Am. St. Rep., 307; 77 Cal., 572.

CHAPTER XVII.

Defenses.—Illegality.*

SECTION 57.

A WANT OR FAILURE OF CONSIDERATION IN A COMMERCIAL CONTRACT IS A PERSONAL DEFENSE AND AVOIDS THE CONTRACT ONLY PRO TANTO. ILLEGALITY OF CONSIDERATION IS USUALLY A REAL DEFENSE AND AVOIDS THE CONTRACT IN TOTO. WHERE A PART OF THE CONSIDERATION IS LEGAL AND A PART IS ILLEGAL THE WHOLE CONTRACT IS VOID.

WIDOE *v.* WEBB.¹

IN THE SUPREME COURT OF OHIO, DEC., 1870.

[*Reported in 20 Ohio St., 431; 5 Am. Rep., 664.*]

The Form of Action.—The original action out of which the present proceeding in error arises, was brought by the present plaintiff against the defendant before a justice of the peace, and, by appeal from his judgment, came into the court of common pleas of Morrow county. The suit was upon a promissory note, made and delivered by the defendant to the plaintiff for \$50⁴⁵/₁₀₀, and the petition was in the usual form.

The defendant answered that the sole consideration of said note was spirituous liquors sold by the plaintiff to the defendant, which had not been inspected according to law, and

*See upon the principal proposition as to the effect of illegal consideration: Hay *v.* Ayling, 16 Q. B., 431; Fareira *v.* Gabell, 89 Pa. St., 89; Shirley *v.* Howard, 53 Ill., 455; Scollans *v.* Flynn, 120 Mass., 271; Eagle *v.* Kohn, 84 Ill., 292; Aurora *v.* West, 22 Ind., 88; Cowing *v.* Altman, 71 N. Y., 435.

¹ This case is cited in Benjamin's Chalmers on Bills, Notes and Checks, 111; Daniel on Negotiable Instruments, 204; Wood's Byles on Bills and Notes, 241, 243; Tiedeman on Commercial Contracts, 179.

which were so sold to be drank on the premises where sold, in violation of law.

The subject-matter of this defence was traversed by reply, in which the plaintiff averred that the note was given for goods, groceries, and provisions sold by plaintiff to defendant before the date of the note.

The issue made by these pleadings was tried by a jury and a verdict found for the defendant, which the plaintiff moved to set aside and grant him a new trial, on the ground of error in the charge of the court to the jury, and that the finding of the jury was against the law, and against the manifest weight of the evidence.

This motion was overruled, and judgment entered on the verdict, to which plaintiff excepted.

From a bill of exceptions taken by the plaintiff, it is shown that the defendant testified upon the trial that the note in suit was given for a balance of an account that had been running for a year and a half preceding the date of the note; that not less than three-fourths of the account was for spirituous liquors bought and drank by him from time to time at plaintiff's grocery, including therein, however, ale and beer; and that part of the account was for cigars, tobacco, and lunches. Other witnesses called by the defendant testified that they had seen defendant purchase and drink spirituous liquors at plaintiff's grocery and get the same charged in his account, and that they had frequently seen him purchase at plaintiff's grocery and have charged to his account all kinds of groceries for family use.

On plaintiff's behalf, both he and his clerk testified that the account which formed the consideration of the note was for groceries purchased out of the plaintiff's store, and that no part of the consideration was for spirituous liquors, to their knowledge.

Thereupon counsel for plaintiff asked the court to charge the jury "that if the consideration of the note in controversy was an account for spirituous liquors in part, sold by plaintiff to defendant, the plaintiff would be entitled to recover so much in this action as the price and value of the groceries so sold."

This charge the court refused to give, and instructed the jury that if any part of the consideration for the note was intoxicating liquors sold to defendant by the plaintiff in violation of the statute prohibiting the sale of intoxicating liquor to be drank on the premises where sold, the plaintiff could not recover; the law being, that when any part of the entire consideration of a promise is illegal, the whole contract is void.

To which charge of the court and refusal to charge as requested, the plaintiff excepted.

The plaintiff subsequently filed his petition in error in the district court, asking for a reversal of the judgment of the court of common pleas, on the grounds of error in the refusal to charge as requested, and in the charge given to the jury, and in overruling the motion to set aside the verdict and grant him a new trial. The district court affirmed the judgment of the common pleas. And to reverse that judgment of affirmance the present petition in error is prosecuted.

The Claim of the Plaintiff in Error.—The common pleas erred in refusing to charge the jury as requested by the plaintiff, and in the charge given.

1. The consideration of the note was several. It was an account that had been accruing some eighteen months, and consisted of items that, from the nature of the transaction, must have been sold at divers times and on different days. In such dealings between parties, every item must have constituted a separate contract, as one was in no way dependent upon another, and the items had no necessary connection with each other. In such case the items purchased that were valid in law and constituted a good consideration are not to be affected by those that were illegal and for that reason void. The purchase of each item of the account was a several contract, is illustrated by the case of *Robinson v. Green*.¹

2. If the different items composing the account consti-

¹3 Metc., 159. See also *Mayor v. Pyne*, 3 Bing., 285; *Perkins v. Hart*, 11 Wheat., 237, 251; *Sickles v. Patterson*, 14 Wend., 257; *Robinson v. Snyder*, 25 Penn. St., 203; *Parsons on Contr.*, 495.

tuted each a several contract, the plaintiff was entitled to recover to the extent of the valid consideration.¹

3. The verdict was against the weight of the evidence as well as against the law.

The Claim of Defendant in Error.—The consideration of the note being a book account made up in part for intoxicating liquors sold in violation of law, the note is void. Being tainted with that illegal consideration, destroys the obligation entirely.²

Decision.—The evidence in this case tended to show that the consideration of the note sued upon was an existing indebtedness of the defendant to the plaintiff on account for goods, etc., sold and delivered by the plaintiff to the defendant, the items of which had accrued at various times during the period of eighteen months preceding the date of the note. Some of these items were for necessary family groceries and some for spirituous liquors, sold to be drank at the place where sold; in violation of the statute. The court instructed

¹The State v. Findley, 10 Ohio, 51; Morris v. Way, 16 Ohio, 469; Doty v. The Knox County Bank, 16 Ohio St., 133; Parish v. Stone, 14 Pick., 198; Robinson v. Green, 3 Metc., 159; 2 Kent's Com., 467, 468; 1 Parsons on Contr., 457.

²S. & C., 729, 1431; Collins v. Merrill, 2 Metc. (Ky.), 163; 3 Bibb., 500; 6 Dana, 91; 8 B. Monr., 98; 9 Ib., 90; Deering v. Chapman, 22 Maine, 488; Hunt v. Knickerbocker, 5 Johns., 327; Greenough v. Balch, 7 Greenl. Rep., 462; Wheeler v. Russell, 17 Mass., 258; 5 B. & C., 406; Kepner v. Kelfer, 6 Watts, 231; Wright v. Gear, 1 Root, 474; Mitchell v. Smith, 4 Dall., 269; Roby v. West, 4 N. H., 287; 1 Taunt., 136; Bliss v. Negus, 8 Mass., 51; 5 N. H., 196; 6 N. H., 225; Cro. Eliz., 199; 3 Taunt., 226; 1 T. R., 227, 359; Comyn's Dig.—Assumpsit, B. B.; 11 East, 502; 7 T. R., 200; 2 Ventr., 223; 8 Johns., 253; Loomis v. Newhall, 15 Pick., 167; Parsons on Contr.; Chitty on Contr. (5th Am. ed.), 417, 427, 692, 694; Metc. on Contr.—Amer. Jurist (No. 43), 45; Higgins v. Pitt, 4 Exch., 324; Trovinger v. McBurney, 5 Cowen, 253; Baldwin v. Palmer, 10 N. Y., 232; Jones v. Waite, 35 E. C. L., 130; Woodruff v. Hinman, 11 Verm., 592; Gamble v. Grimes, 2 Carter (Ind.), 392; 9 Verm., 23, 310; Armstrong v. Toler, 11 Wheat., 258; Perkins v. Cummings, 2 Gray, 258; Adams v. Bowen, 8 S. & M., 624; Arr v. Lacey, 2 Doug. (Mich.) Rep., 230; Miller v. Harden, 32 Ala., 30; Stanley v. Nelson, 28 Ala., 514; Bates v. Watson, 1 Sneed, 376; Nutter v. Stoner, 48 Maine, 163.

the jury that, if any of the items for spirituous liquors thus illegally sold entered into and formed part of the consideration of the note, then the plaintiff could not recover; the law being that when any part of the entire consideration of a promise is illegal the whole contract is void. And the question before us is: Did the court err in so instructing the jury as to the law applicable to the case?

The concurrent doctrine of the text-books on the law of contracts is, that if one of two considerations of a promise be *void* merely, the other will support the promise; but that if one of two considerations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the *whole consideration* is the basis of the *whole promise*. The parts are inseparable.¹

Whilst a partial want or failure of consideration avoids a bill or note only pro tanto, illegality in respect to a part of the consideration avoids it in toto. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire, and cannot be apportioned; and it has been said with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound.²

And, in general, it makes no difference as to the effect, whether the illegality be at common law. or by statute.³

¹ Metcalf on Contr., 246; Addison on Contr., 905; Chitty on Contr., 730; 1 Parsons on Contr., 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94.

² Story on Prom. Notes, and Byles on Bills, *supra*.

³ See authorities, *supra*.

This doctrine is abundantly sustained by the whole current of the decisions on the subject, both in England and in this country.¹

Quite a number of these cases cannot be distinguished from the case under consideration.

Robinson v. Bland was the case of a suit on a bill of exchange given in part for money lost at play, and in part for money lent. The declaration contained special counts on the bill, and the common count for money lent, and it was held no recovery could be had on the bill, because part of its consideration was money lost at play, which was illegal; but as to the money lent, the plaintiff was allowed to recover on the common count.

In Scott v. Gilmore,² the suit was also on a bill of exchange, given by the drawer to the keeper of a coffee house, in payment for the balance of a debt, part of which was for small sums of money loaned, and part for spirits sold in violation of the statute, and it was held by Ch. J. Mansfield, that the security being entire could not be apportioned, and since it was given partly for a consideration not merely void, but illegal, the whole bill was void. Heath, J., said: "Perhaps it might be different if for part of the bill there were no consideration."

The case of Deering v. Chapman, *supra*, was a suit on a promissory note in which part of the consideration was, as here, for spirituous liquors previously sold in violation of a statute, and several of the other cases cited are of the same character. In each of them the whole note was held to be tainted and utterly void. In none of them does a distinction

¹ Featherstone v. Hutchinson, Crokes El., 200; Robinson v. Bland, 2 Burr. R., 1077; Scott v. Gilmore, 3 Taunt., 226; Thomas v. Williams, 10 Barn. & Cress., 664; Jones v. Waite, 35 E. C. L. (5 Bing., N. C., 341); Armstrong v. Toler, 11 Wheat., 258; Bates v. Watson, 1 Sneed, 376; Orr v. Lacey, 2 Douglass, 230; 9 Verm., 23; Deering v. Chapman, 22 Maine, 488; Careleton v. Woods, 8 Foster (N. H.), 290; Hinds v. Chamberlain, 6 N. H., 225; Hinman v. Woodruff, 11 Verm., 582; Perkins v. Cummings, 2 Gray, 258; 8 Sm. & Marsh., 624; Loomis v. Newhall, 15 Pick., 159; Crawford v. Morrell, 8 Johns., 253.

² 3 Taunt., 226.

appear to have been taken between the case where the note was given at the time the illegal transaction took place, which entered into the consideration of the note, and was the immediate inducement to its execution, and the case where the note was subsequently given for the purpose of carrying out or securing the performance of the original illegal contract. On the contrary, they clearly proceed on the principle, that whenever the subject-matter of the contract can be traced back, between privies, to an original illegal contract, the substituted security is void.¹

The application of these principles to the present case compels us to say, that the instruction given the jury by the court, upon the trial, was correct, and the judgment was properly affirmed by the district court.

The suit was upon a promissory note alone—upon a single and entire promise. This note was given in settlement of an account embracing transactions between the parties for a period of eighteen months. The evidence tended to show that whilst some of these transactions were proper and legal, yet many of the items of the account were for intoxicating liquors sold by the plaintiff to the defendant in direct violation of the provisions of a highly penal statute. The contract evidenced by the note was illegal and void, because these sales of liquors, which formed a part of its consideration, were clearly illegal.

With respect to the items of the plaintiff's account which were unconnected with the illegal sales, *he might well have maintained an action on the original contracts of sale, even after the giving of this note. For being utterly void it discharged none of the just indebtedness of the defendant.* But he chose to sue upon the note which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: "It is but a reasonable punishment for

¹Adams et al. v. Rowan et al., 8 Smedes & Marsh., 624.

including with his just due that which he had no right to take."

We are not unaware of a seeming conflict between the conclusion at which we have arrived, and the third point in the syllabus of the case of Doty v. The Knox County Bank.¹ We are by no means satisfied that the judgment in that case was erroneous. The question there arose upon a petition to vacate a judgment which had been rendered at a previous term against Doty and in favor of the bank for upwards of \$4,000, by confession on a warrant of attorney. The suit had been brought on a bill of exchange for \$4,000, and it appeared upon the hearing of the petition for vacation, that a portion of a prior bill for \$1,800 entered into and formed part of the consideration of the bill upon which judgment had been entered. And that, in the previous discounting of the \$1,800 bill, some foreign bank bills of a less denomination than ten dollars had been paid out by the bank, contrary to the provisions of the statute upon that subject. The court below held that the bill

¹ 16 O. St., 133.

Illegality—When It Exists.—The defense of illegality may be interposed when by the terms, purpose, or consideration of a negotiable contract it contravenes: (a) some provision of the statutory law; (b) or the common law; (c) or public policy.

The statute may avoid a contract in two ways: (a) where it declares the same to be void; and (b) where it fixes or inflicts a penalty for the violation of such provisions. This prohibitory penalty of the statute must be clear and unequivocal. Anson on Contracts, p. 172; Pollock on Contracts, 253, 254. If the penalty fixed by the statute for its violation is for administrative purposes only and not as a prohibition then the defense of illegality is but a personal defense and a *bona fide* holder may recover. Paton v. Coit, 5 Mich., 505.

Illegality—Burden of Proof, When Statute Does Not Make Void.—Wherever the consideration of a commercial contract, between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it *bona fide*, and gave value for it. Harvey v. Towers, 6 Exch., 656; Smith v. Braine, 16 Q. B., 201; Bailey v. Bidwell, 13 Mees. & W., 73. The same rule applies where it is shown that the paper was obtained by fraud, or duress, or stolen, or when put in circulation by fraud. Mills v. Barber, 1 Mees. & W., 425; Aldrich v. Warren, 16 Me., 465.

When a part of the consideration of a commercial contract is illegal, the whole contract is void. Coburn v. Odell, 30 N. H.,

of \$1,800, by reason of the premises, was wholly void, and the bank thereupon remitted upon its judgment so much of the \$1,800 as had entered into the consideration of the bill on which judgment had been entered. The residue of this bill was found to have a good and valid consideration, to wit, other and previous bills of exchange on which Doty was justly indebted. The statute forbade the vacating of the judgment until it should be adjudged that there was a valid defence to the action; and the question was whether, after this *remittitur*, the judgment thus reduced should be wholly vacated, and the bank be required to bring its action on the valid bills, which had entered into the consideration of the bill in suit, and as to which there was no defense. The court refused to vacate the judgment *in toto*, and drive the parties into further litigation, which was required neither by considerations of justice, nor

540; Carlton v. Whittier, 5 N. H., 196; Deering v. Chapman, 22 Me., 488.

Illegality—Effect of Part Payment.—Neither will the fact that there has been a partial payment of the note alter this rule, even though the amount of such payment is equal to the illegal consideration which entered into the note; for the reason that the law will apply such payment to the consideration of the note which was legal. Caldwell v. Wentworth, 14 N. H., 431.

Effect of Illegality Upon the Contract, When Once Renewed.—If the consideration of a commercial contract is illegal, a renewal of it does not cure the defect. Neither will the substitution of a new contract. Preston v. Jackson, 2 Stark, 237; Chapman v. Block, 2 B. & Ald., 588. If, however, on the renewal or substitution the illegal part is excluded, the renewal or substituted contract may be enforced. Hay v. Ayling, 20 L. J. Q. B., 171; 16 Q. B., 423; Boulton v. Coghlan, 1 Bing., 640.

What Contracts are Tainted With Illegality.—It may be said as a general rule that the following commercial contracts may not be enforced because of illegality:

1. Those made with alien enemies and in aid of rebellion (Harraner v. Doane, 12 Wall., 342; Critcher v. Holleway, 64 N. C., 526, also 528; Kingsbury v. Fleming, 66 N. C., 524).

2. Bribery, contracts (Parsons v. Thompson, 1 H. Bl., 322; Nichols v. Mudgett, 32 Vt., 546; Martin v. Wade, 37 Cal., 168; Ham v. Smith, 87 Pa. St., 63; Tool Company v. Norris, 2 Wall., 45);

3. Lobbying contracts (Marshall v. B. & O. R. R. Co., 16 How., 314; Rose v. Truax, 21 Barb., 361);

4. Wagering contracts (Walpole v. Saunders, 16 Eng. C. L., 276; Brown v. Leeson, 2 H. Bl., 43);

the provision of the statute, and would have left the parties where they then stood.

It is not every defence which might be available when set up by answer, at the proper time, that will require a judgment to be vacated in order that it may be interposed. In the case referred to, the judgment of the court below was affirmed by this court. Whilst we think that judgment may well be upheld, yet as to the third point of the syllabus which holds that, in so far as the prior illegal bill entered into the consideration of the renewed bill, the latter was merely rendered void *pro tanto* for want of consideration, a majority of the court, upon full consideration, think it cannot be reconciled with the current of the authorities, and that, in so far as it conflicts with the present decision, it is untenable.

The judgment of the district court is affirmed.

Day, J., concurred in the judgment of affirmance, but not in the modification of the case of Doty v. The Knox County Bank.

5. Compounding of crimes (Galton v. Taylor, 7 T. Rep., 475; Murphy v. Bottomer, 40 Mo., 67; Roll v. Ragnet, 4 Ohio, 400; Gardner v. Moxey, 9 B. Mon., 90);

6. Contract in restraint of trade (Mitchell v. Reynolds, 1 P. Wm., 181; Ross v. Sadgleer, 21 Wend., 166; Beal v. Chase, 31 Mich., 490);

7. Contracts for the procurement of marriage and divorce (Adams v. Adams, 25 Minn., 72; Everhart v. Puckett, 73 Ind., 409; Adams v. Adams, 91 N. Y., 381; Phillips v. Meyer, 82 Ill., 67);

8. Contracts in restraint of marriage (Hartley v. Rice, 10 East, 22);

9. Contracts in relation to offenses against morality and religion, (Jackson v. Duchaire, 3 T. Rep., 551; Brown v. Kinsey, 81 N. C., 245);

10. Usury (Byles on Bills, 140).

Illegality—Usury.—Usury is said to be an indictable misdemeanor at common law. Byles, Bills & N., 312. To make a contract void on account of usury, there must be a loan of money as well as a corrupt intention. Again, it is said that at common law it was lawful to exact any rate of interest. Tied. Com. Paper, § 196. No one can become a *bona fide* holder of a note or bill which the statute declares to be void for usury. Rodecker v. Littauer, 8 C. C. A., 320; 59 Fed., 857; Claffin v. Boorum, 122 N. Y., 385, 25 N. E., 360; Tilden v. Blair, 21 Wall., 241; Colby v. Parker, 34 Neb., 510, 52 N. W., 693. The statutes of each state must be examined to know the effect of usury in each of the jurisdictions.

CHAPTER XVIII.

Defenses—Infancy.*

SECTION 58.

MINORS MAY ALWAYS PLEAD INFANCY IN BAR OF ACTIONS UPON THEIR COMMERCIAL CONTRACTS UNLESS THE SAME WERE EXECUTED AND DELIVERED FOR:
(a) NECESSARIES, OR (b) IN SATISFACTION OF A TORT.

WILLIAMSON *v.* WATTS.¹

IN THE COURT OF KING'S BENCH, DEC., 1808.

[*Reported in 1 Campbell, 552.*]

The Form of Action.—Assumpsit on a bill of exchange. Plea, infancy. Replication, that the bill was accepted for necessities, and issue thereupon.

¹This case is cited in, Daniel on Negotiable Instruments, 225; Wood's Byles on Bills and Notes, 117, 120; Randolph on Commercial Paper, 393; Story on Bills, 84, 85; Chitty on Bills, 18, 19; Ames on Bills and Notes, 463; Benjamin's Chalmers, on Bills, Notes and Checks, 73; Norton on Bills and Notes, 208, 210.

*An infant cannot accept a bill of exchange for necessities.

Incapacity — Infants — Liability for Necessaries and Torts.—Infants are not liable upon their contracts as a general rule, unless the same have been duly ratified. If, however, the contracts are executed for necessities, or given in satisfaction of damages growing out of a tort, his infancy is no bar to a recovery. Guthrie *v.* Murphy, 4 Watts (Pa.), 80; Angel *v.* McClellan, 16 Mass., 28; Bradley *v.* Pratt, 23 Vt., 378. That he is liable for his torts see, Ray *v.* Tibbs, 50 Vt., 688; Cooley on Torts, 103 et. seq.

If an infant and an adult execute a note jointly, the adult only is liable. In England it is held that the action may be brought against the adult without making the infant a party. Burgess *v.* Merrill, 4 Taunt., 468. See also Taylor *v.* Dansby, 42 Mich., 84; Slocum *v.* Hooker, 12 Barb., 563. See as well the statutes of your state.

Incapacity—Coverature.—At common law a married woman could not bind herself as the drawer, acceptor, maker, or indorser

Decision.—Sir James Mansfield, C. J., said, This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is

of a commercial contract. Chitty on Bills, 28; Waterbury v. Andrews, 67 Mich., 282; Mason v. Morgan, 2 Ad. & El., 30; Howe v. Wildes, 34 Me., 566. This common law rule has been greatly modified in many jurisdictions so that now she may execute these contracts and render her sole and separate estate liable as though she were *feme sole*. As a general rule, however, it must appear expressly:

1. That she intended to charge her separate estate; and
 2. That the consideration was for the benefit of her estate.
- McVey v. Cantrell, 70 N. Y., 295; Yale v. Dederer, 22 N. Y., 450; Corn Exchange Ins. Co. v. Babcock, 42 N. Y., 613; Frank v. Lillienfield, 33 Grat. (Va.), 394; Morrison v. Thistle, 67 Mo., 596; Williams v. Urmston, 35 Ohio St., 296. See also Kenston Ins. Co. v. McClellan, 43 Mich., 564.

Incapacity of Bankrupts.—A bill or note, executed by a bankrupt after his discharge, for a prior debt, the consideration of which being the discharge of bankruptcy proceedings, is void. Fell v. Cook, 44 Iowa, 485; Hersey v. Elliott, 67 Me., 527; Story on Bills, § 102.

Incapacity of Persons Under Guardianship.—“Persons under guardianship,” says Mr. Daniel, “whether for infancy, imbecility, improvidence, or otherwise, cannot contract, and therefore cannot be parties to negotiable instruments. Therefore if a spendthrift, under guardianship, indorse a note, he does not pass title, and is not bound by the indorsement. It is simply void.” Daniel on Negotiable Instruments, § 250; Lynch v. Dodge, 130 Mass., 458.

Incapacity of Persons Who Execute Commercial Contracts While Intoxicated.—In speaking of the effect of intoxication of the maker upon commercial contracts, Williams, J., in the case of The State Bank v. McCoy, (19 P. F. Smith (Pa.), 204), said: “If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle, that where a loss must be borne by one of two innocent persons, it shall be borne by him who has occasioned it But there is another and controlling reason for holding the maker liable to the indorsee in such case, founded on principles of public policy and the necessities of commerce. The exigencies of trade require that there should be no unnecessary impediments to the ready circulation and currency of negotiable paper, but that it should be left free to pass from hand to hand like bank notes, and perform the functions of

nonsense and ought to have been demurred to. As the point of law is so clear, I am strongly inclined to non-suit the plaintiff. However, if I am required to hear the evidence, I will do so, and the defendant will find redress in the court above, should the verdict be against her.

money, untrammelled by any equities or defenses between the original parties. If, then, it should be held that the drunkenness of the maker avoids the note in the hands of the indorsee, it is obvious that such a rule would greatly clog and embarrass the circulation of commercial paper, for no man could safely take it without ascertaining the condition of the maker or drawer when it was given, although there might be nothing suspicious in its appearance or unusual in the character of the signature."

The law formerly was that a party to a contract could not avoid it because he was so drunk at the time he signed it that he could not understand it. It has also been held that a party to a contract cannot avoid it on account of intoxication, unless another party to it used means to induce such intoxication; but the decided weight of authority now is that a party may avoid a contract made by him when he is so drunk that he cannot understand its effects and consequences, though no such means were used. It is a violation of moral obligation and legal duty to take advantage of a man in such a defenseless situation, and, if the intoxication was induced by the party taking such advantage, he would be guilty of still greater moral turpitude. *Barrett v. Buxton*, 2 Aiken, 167; *Bush v. Breinig*, 113 Pa. St., 310, 6 Atl., 86; *Prentice v. Achorn*, 2 Paige, 29; 7 Daniel, Neg. Inst. § 214. A person entering into a contract, while temporarily deprived of his reason by intoxication, may avoid or ratify it when he becomes sober. It is not absolutely void. If the paper is negotiable, it cannot be avoided in the hands of an indorsee in good faith for a valuable consideration; and if such paper is indorsed before it has become due, for a valuable consideration, such defense cannot avail against the assignee without proving that he had notice of the defense before the indorsement, or notice of facts or circumstances sufficient to induce a reasonable man to inquire of the maker as to the defense. It may be said that a person who executes a proposed negotiable paper, while deprived of reason by insanity, may avoid it in the hands of an innocent indorsee, and that the same rule should apply when the person is deprived of reason by intoxication. The considerations upon which the rules stand are dissimilar. Insanity is involuntary, it is a disease, and is a more permanent state, and usually is not the result of the act of the person imposed upon; while drunkenness is voluntary, and is a temporary state, and is regarded as a vice,—the helpless condition of the drunkard is his own fault.

Other reasons support the rule that negotiable paper cannot be avoided in the hands of innocent holders because of intoxication.

It appeared that the defendant was a woman of the town, and that the consideration for the acceptance was the sale of silk stockings and other expensive articles of dress. Whereupon a non-suit was directed.¹

If the loss must fall upon one of two innocent persons, it should be borne by the one whose fault contributed to it, if the fault of either did. There are also considerations of public policy which contribute to support the rule. It is believed that the exigencies of business and the necessities of commerce demand that negotiable paper shall pass from hand to hand without unnecessary impediment. *McSparran v. Neeley*, 91 Pa. St., 18; *Miller v. Finley*, 26 Mich., 249; *Smith v. Williamson*, 8 Utah, 219. It has been held that total drunkenness producing complete suspension of reason is a defense to an action on a bill or note. *Berkley v. Cannon*, 4 Rich. Law (S. C.), 136; *Molton v. Camroux*, 2 Exch., 487; *Gore v. Gibson*, 13 Mees. & W., 623; *Holland v. Barnes*, 53 Ala., 83. The former rule was that a man could not protect himself from any deed or agreement by pleading drunkenness, unless he could show that the drunkenness was brought about by the connivance of him who procured the deed or agreement. *Cooke v. Clayworth*, 18 Ves., 12. Drunkenness must be specially pleaded. *Gore v. Gibson*, 13 Mees. & W., 623. Illustrative cases on Bills and Notes, 193.

¹ I do not find any case in which it has been expressly decided, that an infant may not bind himself by a negotiable instrument for necessities; and in *Williams v. Harrison*, Carth. 160, the court of K. B. in the time of *Ld. Holt*, seem rather to have been of opinion, that he might, although not liable upon a bill of exchange drawn in the course of trade. It is now settled, however, that an account stated by an infant, even of moneys due for necessities, is invalid, *Trueman v. Hurst*, 1 T. R., 40; *Bartlett v. Emery*, *Ib.*, 42; and it seems inevitably to follow, that he cannot be bound by his signature to a negotiable bill or note, as that not only *prima facie* admits the debt, but if valid, would render him liable to an action at the suit of the indorsee in which the amount of the original debt could not be disputed. The old doctrine, that a *single bill* given by an infant for necessities is binding, though of no immediate practical use such an instrument being now as rare as a statute staple, seems to afford an argument from analogy to show, that a promissory note given by an infant for necessities would be binding, if payable only to the person who supplied them. *Co. Litt.*, 172. a.

CHAPTER XIX.

Bona Fide Holder.—Who Is? *

SECTION 59.

A HOLDER OF NEGOTIABLE PAPER, WHO TAKES IT BEFORE MATURITY, FOR A VALUABLE CONSIDERATION, IN THE USUAL COURSE OF TRADE, AND WITHOUT KNOWLEDGE OF FACTS WHICH IMPEACH ITS VALIDITY BETWEEN ANTECEDENT PARTIES, HOLDS IT BY A GOOD TITLE, AND MAY MAINTAIN AN ACTION UPON THE SAME.

JOHNSON *v.* WAY.¹

IN THE SUPREME COURT, OHIO, DEC., 1875.

[*Reported in 27 Ohio St., 374.*]

The Form of Action.—The plaintiff brought suit in the Court of Common Pleas of Portage county to recover of the

¹This case is cited in Daniel on Negotiable Instruments, 769, 775; Wood's Byles on Bills and Notes, 210; Benjamin's Chalmers on Bills, Notes and Checks, 103; Tiedeman on Commercial Paper, 280, 289; Norton on Bills and Notes, 111, 301, 304.

*1. A holder of negotiable paper, who takes it (1) before maturity, (2) for a valuable consideration, in the usual course of trade, and (4) without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title.

2. To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man.

3. To have that effect, it must be shown that he took the paper under circumstances *showing bad faith or want of honesty on his part.*

□4. Circumstances tending to show bad faith or fraud in taking such paper, are admissible in evidence, and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defenses existing between antecedent parties.

defendant the amount of two promissory notes of seventy-five dollars each, of which the following is a copy:

“State of Ohio, July 29, 1869.

“Three months after date, I promise to pay to the order of L. A. Wilder, seventy-five dollars, for value received, with use.

[Stamp.]

“Solomon Way.”

“Indorsed: I hereby certify that I am worth \$8,000, consisting of personal property to the amount of \$1,000 and one hundred and seventeen acres of land. I make this statement for the purpose of obtaining credit.

“Solomon Way.”

“Indorsed, without recourse, to L. A. Wilder.”

The second note is like the first, except due in *four* months after date.

On the trial the plaintiff admitted that the notes were given for a worthless patent right metallic roofing cement, and were without consideration, as between the original parties.

The proof shows that one Lewis D. Joy bought the notes before maturity; that Joy paid \$100 cash for each \$150 of notes, and received them indorsed “without recourse;” that the plaintiff bought the notes of Joy before maturity, and paid the face thereof in coal stock of the Trumbull Coal Company (an incorporated mining company), at fifty cents on the dollar of its par value; that the coal stock was delivered to Joy and the notes to Johnson before they matured, and without any actual notice of any defense.

On the trial the plaintiff asked the court to charge the jury as follows:

“1. Suspicion of defect of title, or fraudulent inception, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title; that result can be produced only by *bad faith* on his part; mere want of caution and care is not enough.

“2. In brief, did the plaintiff or Joy buy the notes in good faith and without fraud, for value, before due? If so,

and without notice of any defect, plaintiff is entitled to recover. It is a question of good faith and fraud, and not of carelessness or negligence on the part of plaintiff or Joy, unless it amounts to fraud or want of good faith.

“3. That the law presumes *prima facie* in favor of every holder of negotiable paper, that, 1st. He is the owner of it; 2d. That he took it for value; 3d. Before due; 4th. In the regular course of trade; and plaintiff is entitled to recover, unless these presumptions of law are overcome by proof in the case.”

The court refused to charge as requested, but charged the jury upon the point in question as follows:

“If the proof shows that both Johnson and Joy took these notes with notice of their infirmities, then plaintiff ought not to recover, and upon this proposition the burden of proof rests upon the defendant.

“To constitute a sufficient notice, it is not essential that the party should have had actual positive notice of the defects of the notes, but if the circumstances and facts connected with, and surrounding the transfer, whether they appeared upon the notes themselves, or outside of them, were of such strong and pointed character as to put the purchaser on inquiry, then the law presumes that he did make those inquiries, or that if he did not he should bear the responsibility in the same manner as if he had made them, and they had led him to a full knowledge of the whole truth connected with giving the notes. The purchaser was not bound to make inquiries, unless there was something in the circumstances of the case that would have put an ordinarily careful and prudent man upon investigation. But while the purchaser was not bound to make inquiries from motives of mere curiosity and suspicion, yet he was not at liberty to shut his eyes to facts and circumstances that presented themselves to him, if those facts and circumstances would have attracted the attention of a man of common prudence. It was not enough if the facts and circumstances were merely sufficient to suggest inquiry by the most cautious; nor does the law require circumstances so startling as to awaken investigation on the part of the most dull and stolid. But if the defendant has shown you by testi-

mony, to your satisfaction, that Joy and Johnson had actual notice of the time of the purchase of the notes of their defects and infirmities, or if they had such knowledge of facts and circumstances as to put a reasonable and prudent man upon inquiry, then the plaintiff can not recover."

To the refusal of the court to charge as requested, and to the charge as given, the plaintiff excepted. Judgment was rendered for the defendant, and on petition in error the judgment of the Common Pleas was affirmed by the District Court. It is now sought to reverse the judgments of the courts below for error in the charge given to the jury on the trial in the Court of Common Pleas.

The Claim of Plaintiff in Error.—The court erred in its charge, which was, in substance, that "the plaintiff, having admitted that the notes were without consideration between the original parties, he is not entitled to recover, unless he proves (independent of any presumption of law) that he bought them before due, and paid value in the regular course of trade.¹ And as to notice, see the following cases:—Goodman v. Simons,² Andrews v. Pond,³ Fowler v. Brantly,⁴ Bank of Pittsburg v. Neal.⁵

The indorsement furnished no evidence or ground of suspicion to put plaintiff on inquiry.⁶

The purchaser of commercial paper, before due, in good faith, for value, in the regular course of trade, holds it discharged of all prior equities. Circumstances of suspicion that would attract the attention of a man of common prudence, or even carelessness or gross negligence on his part, at

¹ 1 Parsons on Notes and Bills, 185; Swift v. Tyson, 16 Pet., 16; Nixon v. DeWolf, 10 Gray, 348; Dumont v. Williamson, 18 Ohio St., 115; Davis v. Bartlett, 12 Ib., 544.

² 20 How., 365.

³ 13 Pet., 65.

⁴ 14 Ib., 318.

⁵ 22 How., 108; 2 Parsons on Con., 3, 4.

⁶ Russell v. Ball, 2 Johns., 50; Goddard v. Lyman, 14 Pick., 268; Bisbing v. Graham, 14 P. S., 14; Epler v. Funk, 8 Barr., 468.

the time of the purchase, will not defeat his title. That can only be effected by *actual* notice, or fraud on his part.¹

The rule in England originally for a long period protected the holder against the fraud of antecedent parties, unless he was shown to have had actual notice, or was guilty of bad faith. It was first announced by Ld. Mansfield in 1758, in *Miller v. Race*,² and was reaffirmed by the same judge in *Grant v. Vaughn*.³ In 1764, and through all the long period following it, not only in that, but the various other courts of that country, it remained the unquestionable law of the land down to 1824, when *Gill v. Cubit*,⁴ changed the rule, and made the holder chargeable with knowledge, if the circumstances were such as ought to have excited the suspicions of a person of reasonable care and prudence.

In 1834, in *Crook v. Jadis*,⁵ the Court of King's Bench again changed the law, and held that the owner should be protected unless guilty of gross negligence in the purchase. But in 1836, the law having been found not only unsatisfactory to commerce, but to the courts themselves as being too variant and changeable, and depending upon the intelligence and capacity not only of the purchaser, but even of the jury who might try the question, that same court, in *Goodman v. Harvey*, rising above the erroneous precedents of the cases, commencing with *Gill v. Cubit*, and seeming to appreciate the increased and constantly increasing requirements of the business interests of the country and of trade, brushed away the uncertainty and changeableness attendant on the application of the rule as held in *Gill v. Cubit* and *Crooks v. Jadis*, and returned to the original doctrine of *Miller v. Race*, which has ever since been the settled law of that country, affirmed by numerous decisions since then, so repeatedly and decidedly that no late jurist or elementary writer is found to dispute the

¹ *Murray v. Lardner*, 2 Wall., 121; *Goodman v. Harvey*, 4 Adol. & Ellis., 470.

² 1 Bur. King's Bench Rep., 452.

³ 3 Bur. 15, 16.

⁴ 3 Barn. & Cress., 466.

⁵ 5 Barn. & Ad., 909.

proposition, "that nothing short of actual notice, or bad faith (fraud) will defeat the title of the holder."¹

For the law as declared in this country see: *Swift v. Tyson*,² *Goodman v. Simons*,³ *Bank of Pittsburg, v. Neal*,⁴ *Murray v. Lardner*,⁵ *Edwards on Bills and Notes*,⁶ *Uther v. Rich*,⁷ *Steinbacker v. Boker*,⁸ *Magee v. Badger*,⁹ *Belmont Bank v. Hodge*,¹⁰ *Brush v. Scribner*.¹¹

Decision.—The questions made in the case relate to the rights of indorsees of negotiable paper, and arise upon the charge of the court to the jury. Though other questions are made in argument, we do not deem it important to notice here but one of the grounds of exception.

The court charged the jury, that, as the notes were conceded to be invalid as between the original parties, the plaintiff, though an indorsee of the notes for value before due, could not recover, if he had such knowledge of facts and circumstances as to put an ordinarily careful and prudent man upon inquiry as to the infirmities of the notes.

The question, then is, whether this rule is to be applied to a holder of negotiable paper, and to whom it is indorsed in the usual course of trade, for value before due.

It was early the settled law in England, in regard to paper drawn in a form to pass from hand to hand in the course of business and trade, that the holder, who came by it fairly

¹ *Raphael v. Bank of England*, 84 English Com. Law, 161; *Carlton v. Ireland*, 85 Com. Law, 765.

² 16 Pet., 15.

³ 20 How., 343.

⁴ 22 Ib., 108.

⁵ 2 Wall., 110.

⁶ 318.

⁷ 10 Adol. & Ellis, 784.

⁸ 34 Barb., 436.

⁹ 34 N. Y., 247.

¹⁰ 35 Ib., 65.

¹¹ 11 Conn., 388; 10 Cush., 488; 4 Ga., 287; 13 Ala., 390.

and honestly, before due, for a valuable consideration, had a good title.¹

In 1824, in *Gill v. Cubit*,² the Court of King's Bench added a new limitation to the title of the holder of negotiable paper, and held that he acquires no title, as against the equities of antecedent parties, if he takes it under circumstances which would excite the suspicions of a prudent and careful man. This rule was followed for a number of years in England, and by many of the courts of this country.

But in 1834, in *Crook v. Jadis*,³ this rule was so far shaken, that an indorsee of a bill of exchange was permitted to recover against the drawer unless he proved that the indorsee was guilty of gross negligence in taking the bill; and two years later, in *Goodman v. Harvey*,⁴ it was decided that gross negligence is not alone enough to destroy the title of a holder for value, but that a case of bad faith in taking the security must be made against him, in order to defeat the claim.

Since 1836, the rule established in *Goodman v. Harvey* has been followed by the British courts, and may now be regarded as the settled law of that country.⁵

Although the rule declared in *Gill v. Cubit* has been followed by many of the courts of this country, it has been so generally repudiated by the more modern decisions, and that of *Goodman v. Harvey*, approved, that the doctrine of this case may now be regarded to be the American as well as English law upon the subject.⁶

¹ Salk., 126; *Miller v. Race*, 1 Bur., 452; *Peacock v. Rhodes*, Doug., 633; *Lawson v. Weston*, 4 Esp., 26; *Gorgier v. Mievill*, 3 Barn. & Cres., 45.

² 3 Barn. & Cres., 466.

³ 5 Barn. & Ad., 909.

⁴ 4 Ad. & El., 870.

⁵ *Raphael v. The Bank of England*, 17 C. B. (84 E. C. L.), 161.

⁶ *Worcester County Bank v. Dorchester and Milton Bank*, 10 Cush., 488; *Smith v. Livingston*, 111 Mass., 342; *Matthews v. Poythress*, 4 Geo., 287; *Miller v. Einley*, 26 Mich., 249; *Phelan v. Moss*, 67 Penn. St., 59; *Magee v. Badger*, 34 N. Y., 247; *Belmont Bank v. Hoge*, 35 N. Y., 65; *Goodman v. Simonds*, 20 How., 343; *Murray v. Lardner*, 2 Wall., 110; *Hotchkiss v. National Bank*, 21 Wall., 354; 1 Smith's Lead. Cas. (7 Am. ed.), 825; *Redfield & Bigelow's Lead. Cas. on Bills and Notes*, 257.

In the case of the Belmont Bank v. Hoge, *supra*, the view of the New York Court of Appeals upon the question is stated as follows: “*One who, for full value, obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defects in the title of the presumptive owner, is to be deemed a bona fide holder. He does not owe to the party who puts such paper in circulation the duty of active inquiry, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his probable diligence or negligence.*”

In Smith v. Livingston,¹ the court disapprove the rule of Gill v. Cubit, and say: “Circumstances which might excite the suspicions of one man might not attract the attention of another. It is a rule which business men can not act upon in the ordinary affairs of life with any certainty that they are safe.”

¹ 111 Mass., 345.

Purchaser for Value Without Notice—Defined.—A “*bona fide* holder,” or a “purchaser for value without notice,” of a commercial contract, is one who has taken it:

1. Before maturity;
2. For a valuable consideration;
3. In the due course of business; and
4. Without notice of its dishonor or of facts which impeach its validity. Miller v. Race, 1 Burr., 452; McCauley v. Murdock, 97 Ind., 230; Scotten v. Randolph, 96 Ind., 581; Doane v. Kind, 30 Fed. Rep., 106; Adams v. Robinson, 69 Ga., 627; Trust Co. v. Bank, 101 U. S., 68; Whistler v. Forster, 14 C. B. (N. S.), at 258; Barnum v. Phenix Co., 60 Mich., 388; Gee v. Saunders, 66 Tex., 333; Palmer v. Marshall, 60 Ill., 289; Swall v. Clarke, 51 Col., 227; Ward v. Howard, 88 N. Y., 74; Johnson v. Way, 27 Ohio St., 374; Robertson v. Coleman, 141 Mass., 231; Dreilling v. First Nat. Bk., 43 Kan., 197; 23 Pac. Rep., 94.

Purchaser Before Maturity.—In the case of Fisher v. Leland, Shaw, C. J., said, “where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation? Why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and

In *Murray v. Lardner*, *supra*, the law in regard to negotiable paper, as settled by the Supreme Court of the United States, is summarized, as follows: "The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. . . . The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith."

It was, moreover, settled in that case, that circumstances tending to show bad faith or fraud in taking such paper, though not conclusive in themselves, are admissible in evidence, and the establishment of bad faith or fraud, whether by direct or circumstantial evidence, is fatal to the title of the party so taking it.

subject to any defense which might be made if the suit were brought by the indorser." 4 Cush., 456; *Morgan v. U. S.*, 113 U. S., 500; *Church v. Clapp*, 47 Mich., 257; *Woodsmer v. Cole*, 69 Cal., 142; *Haywood v. Seeler*, 61 Ia., 574; *Speck v. Pullman Car Co.*, 121 Ill., 57; *Hinckley v. Union P. R. R.*, 129 Mass., 61; *Ford v. Phillips*, 83 Mo., 530; *Griffin v. Hartz*, 94 N. C., 440; *Woodworth v. Huntoon*, 46 Ill., 131; *Watson v. Alley*, 141 Ill., 284; 31 N. E. Rep., 419.

(a.) **Exception.**—There is one exception to the rule as stated above and that is, if the holder acquired the bill or note after maturity, from one who became a *bona fide* holder before maturity, he then will have a good title, freed from personal defenses. This principle rests upon the doctrine that the indorsee takes no less title than his indorser has. *Roberts v. Lane*, 64 Me., 108; *Bassett v. Avery*, 15 Ohio St., 299; *Richert v. Tulford*, 52 Ill., 166; *Woodman v. Churchill*, 52 Me., 58; *Wilson v. Mechanic's Bank*, 45 Pa. St., 494; *Bissell v. Gowdy*, 31 Conn., 48. This exception it is held does not apply against an accommodation party. *Dun v. Weston*, 71 Me., 270; *Daniel on Negotiable Instruments*, § 786.

Bill or Note Payable on Demand or at Sight.—When Over Due.—A bill or note payable on demand or at sight is payable within a "reasonable time," when that time has passed such instruments are over or past due. What a "reasonable time" is

The rule established in these cases neither restricts the usefulness of paper made to pass from hand to hand in commerce, nor does it relieve the party taking it from the obligations of good faith. This rule may be more readily applied than that laid down in *Gill v. Cubit*, for a rule based on good faith as a standard is more easily comprehended than one grounded upon speculations as to what ought to excite the suspicions of a prudent man. A prudent man, it has been well said, may be more or less suspicious under similar circumstances at one time than at another, and may also suspect where another equally prudent would not, and the standard of the jury may be higher or lower than that of other men who are prudent in the management of their affairs.

The point in controversy has not been directly determined by the Supreme Court of this state. The rules laid down in *Davis v. Bartlett*,¹ which are stated in the syllabus,

¹ 12 Ohio St., 534.

cannot be fixed by any definite and precise rule. What would be a reasonable time in one case might be unreasonable in an other under different circumstances. For illustrations see, *Mitchell v. Catchings*, 23 Fed. Rep., 710; *Paine v. Cent. Vt. R. R. Co.*, 14 Fed. Rep., 270; *First Nat. Bk. v. Needham*, 29 Iowa, 249; *Herrick v. Wolverton*, 41 N. Y., 581; *Cowling v. Altman*, 71 N. Y., 435; *Cripps v. Davis*, 12 M. & W., 159, 165. In Michigan it is held that a demand note is due and payable at once, and without demand. *Palmer v. Palmer*, 36 Mich., 487; 94 Mich., 411; 132 Mass., 338; 146 Mass., 118; 83 N. Y., 456; 11 Ohio St., 601. This question is regulated in some states by statute.

Bill or Note Payable in Installments, Either of Principle or Interest—When Over Due.—If the commercial contract is payable in installments, the maturity and non-payment of the installment makes the same overdue so that a purchaser thereof would be chargeable with equities between original parties. *Field v. Tibbetts*, 57 Me., 359; *Vinton v. King*, 4 Allen, 561; *Hart v. Stickney*, 41 Wis., 630. The rule, whether the non-payment of an installment of interest when due, is equivalent to notice of dishonor, is controverted. In support of the rule see, *Newell v. Gregg*, 51 Barb., 263. Contra, *Kelly v. Whitney*, 45 Wis., 110; *National Bk. v. Kirby*, 108 Mass., 497; 30 Am. Rep., 702.

Bill or Note, Not Matured Until Expiration of the Day When it is Legally Due.—A bill or note is not past maturity or over due until after the expiration of the day on which it becomes legally due, unless the same has been actually dishonored before the last day has fully expired. *Bosch v. Cassig*, 64 Ia., 314;

are, however, in harmony with that of *Goodman v. Harvey*; so is the decision in *Bassett v. Avery*,¹ as well as the principle upon which the case was decided. But a remark upon a hypothetical case stated in the opinion delivered in *Bassett v. Avery* warrants the charge to the jury complained of in this case. Speaking of what might constitute a defense against an indorsee of a negotiable note, it is said: "If such circumstances of suspicion had been shown to exist as ought to have put Bassett upon inquiry before purchasing, he would be presumed to have either made the inquiry and ascertained the truth, or have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser."

¹ 15 Ohio St., 299.

Crosby v. Grant, 36 N. H., 273; *Continental N. B. v. Townsend*, 87 N. Y., 10. Therefore a purchaser may be a *bona fide* holder, who purchases a bill or note on the last day of grace. See contra, *Pine v. Smith*, 11 Gray, 38.

Purchaser for a Valuable Consideration.—One of the requisites of a *bona fide* holding of a negotiable contract is that the holder must have paid a valuable consideration for the same. Value is either money or money's worth. The amount of value or money paid is not important except as it may have a bearing upon the question of actual or constructive notice of equities. *DeWitt v. Perkins*, 22 Wis., 451; *Lay v. Wissman*, 36 Ia., 305; *King v. Nichols*, 138 Mass., 20; *Smith v. Jansen*, 12 Neb., 125; *Dreilling v. First Nat. Bk.*, 43 Kan., 197.

Valuable Consideration—Defined.—The following considerations have been held to be valuable:

1. The surrendering of negotiable securities;
2. Giving one's signature to a negotiable paper;
3. Releasing an existing debt, (upon this question there is much conflict of authority see in favor, *Swift v. Tyson*, 16 Peters, 1; and contra, *Bay v. Coddington*, 5 Johnson Ch., 54);
4. An agreement to forbear (*Oates v. First Nat. Bk.*, 100 U. S., 239);
5. Holding as collateral security (see contra, *Bay v. Coddington*.)

If the purchaser receives actual notice of dishonor after the agreement to purchase and before the purchase money is paid, he is only protected to the extent of money or value actually paid. *Dresser v. Railway Company*.

Purchaser in the Due Course of Business—Defined.—A *bona fide* holder in order to be protected must have purchased in the due or ordinary course of business. The "due or ordinary course of business" means a transaction according to the usages

This statement is made upon the authority of *Williamson v. Brown*;¹ but that case did not relate to negotiable paper; and we have seen, moreover, that a different rule now obtains in New York in reference to that kind of instruments.

In *McKesson v. Stanbury*,² it was only necessary to determine upon which party the burden of proof rested, and the case, as explained, and upon the principles settled in *Davis v. Bartlett*, was decided right. The statement in the opinion in regard to the prudence required of an indorsee of negotiable paper was unnecessary in the decision of the case, and like that of a similar character in *Bassett v. Avery*, may be re-

¹ 15 N. Y., 354.

² 3 Ohio St., 156.

and customs of commercial transactions. *Elias v. Finnegan*, 37 Minn., 145; *Kellogg v. Curtis*, 69 Me., 212. One who receives a bill or note as a receiver, or as assignee for the benefit of creditors, or as executor or administrator, or as trustee, does not receive the same in the "due course of business." *Briggs v. Merrill*, 58 Barb., 379; *Billings v. Collins*, 44 Me., 271; *Roberts v. Hall*, 37 Conn., 205; *Earhart v. Gant*, 32 Ia., 481; *Kemper v. Comer*, 73 Tex., 201; *Gilson v. Miller*, 29 Mich., 355.

Purchaser "Without Notice"—Kinds of Notice—Actual and Constructive—Defined.—A *bona fide* holder must have acquired the commercial contract without notice of its dishonor. The notice necessary to establish a privity is either actual or constructive. By "actual notice" is meant either knowledge of a fact or the means of such knowledge to which the holder has dishonestly or corruptly shut his eyes. By "constructive notice" is meant that the purchaser of a commercial contract has read it and therefore is chargeable with a knowledge of everything apparent upon the face of such paper.

Mere "negligence" will not charge a purchaser with "actual notice," unless the same amounts to bad faith. Negligence however is evidence of bad faith. *Johnson v. Way*, 27 Ohio St., 374; *Lawson v. Weston*, 4 Esp., 56; *Goodman v. Harvey*, 4 A. & E., 470.

Neither will actual notice defeat recovery by an indorsee if his indorser was a purchaser for value without notice. *Kost v. Bender*, 25 Mich., 615; *Chalmers v. Lanion*, 1 Camp., 383; *Bank etc., v. Gore*, 63 Cal., 355; *Fairclough v. Pavia*, 9 Ex., 690; *Eckhert v. Ellis*, 26 Hun., 663.

The purchaser is charged with constructive notice of every defect apparent upon the paper, such as for example, the kinds of indorsements, whether restrictive or conditional, or anomalous, etc.; the time of payment; want of signature; that blanks are not

garded only as a *dictum*. Without questioning the correctness of the decisive points of these cases, we do not feel bound to follow the *dicta* referred to. Although entitled to great weight as the utterances of able judges, and warranted by a line of decisions, they were, however, only incidental remarks in the cases in which they were made, and are not in accordance with the rule as now settled by repeated decisions of the highest courts of England and America.

Guided by the leading authorities of both countries, we are brought to the following conclusions:

A holder of negotiable paper, who takes it before maturity, for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title.

filled; that there has been a cancellation or alteration apparent upon its face. See *Angle v. N. W. Ins. Co.*, 92 U. S., 342; *Rowland v. Fowler*, 47 Conn., 347; *Davis Mach. Co. v. Best*, 105 N. Y., 59; *McBain v. Seligman*, 58 Mich., 294; *Merchants Bk. v. Hanson*, 33 Minn., 43.

Notice to Agent—Effect Of.—In the case of notice, the general rule is that notice to an agent is notice to the principal. But this rule is subject to these qualifications: (a) that the notice to the agent which will affect the principal, must have been received in the same transaction or at least so recently that it may be presumed to have remained in his memory; and (b) it must be a notice of a material fact, and one which it would be the duty of the agent to communicate to his principal. *Kaufman v. Robey*, 60 Tex., 308; 48 Am. Rep., 266.

Notice of Equities—When the Rule Does Not Apply.—The rule that a purchaser of a commercial contract cannot recover, when he either has notice of equities or where he purchases after maturity, does not apply when he purchases of one having a good title. *Kost v. Bender*, 25 Mich., 515; *Scotland Co. v. Hill*, 132 U. S., 117; *Shaw v. Clark*, 49 Mich., 384; *Bodley v. Nat. Bk.*, 38 Kan., 61; *Graham v. Larimer*, 83 Cal., 179; *Woodworth v. Huntoon*, 40 Ill., 131; *Bassett v. Avery*, 15 Ohio St., 299; *Suffolk Bk. v. Boston*, 149 Mass., 305; *Hereth v. Merchants Bk.*, 34 Ind., 380. There is one limitation upon this exception, and that is when he is one of the original parties. *Kost v. Bender*, *supra*.

Transfer of Bill or Note, Payable "To Order" Without Indorsement.—"It is too well settled by authority, both in England and in America, to permit of questioning, that the purchaser of a draft, check or promissory note, who obtains title without indorsement (where it is payable to order) by the payee,

To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man.

To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part.

Circumstances tending to show bad faith or fraud in taking such paper, though not conclusive in themselves, are admissible in evidence; and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defenses existing between antecedent parties.

It follows that the judgment of the District Court and that of the Common Pleas must be reversed, and that the cause must be remanded for further proceedings.

Judgment accordingly.

holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities, and in the due course of trade and before maturity." *The Goshen Bank v. Bingham*, 118 N. Y., 349; *Trust Company v. National Bank*, 101 U. S., 68; *Lancaster Bank v. Taylor*, 100 Mass., 18; *Harrop v. Fisher*, 30 L. J., 283.

The reasoning on which this doctrine is founded may be briefly stated as follows: "The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, and in the due course of trade, without notice of equities, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder." But when a negotiable contract is payable to a person or his order and is transferred without indorsement, it is treated as a chose in action transferred by assignment to the purchaser. The assignee, under the modern rule, acquires all the title of the assignor and may maintain an action thereon in his own name. But he is treated as an assignee the same as an assignee of a common law contract and is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder. *The Goshen Bank v. Bingham*, *supra*.

CHAPTER XX.

Checks and Bills of Exchange Distinguished.

SECTION 60.

A CHECK IS A WRITTEN ORDER OR REQUEST, ADDRESSED TO A BANK OR TO PERSONS CARRYING ON THE BUSINESS OF BANKING, BY A PARTY HAVING MONEY IN THEIR HANDS, REQUESTING THEM TO PAY ON PRESENTMENT TO ANOTHER PERSON, OR TO BEARER, OR ORDER, A CERTAIN SUM OF MONEY SPECIFIED IN THE INSTRUMENT.*

MORRISON ET AL. *v.* BAILEY ET AL.¹

IN THE SUPREME COURT OF OHIO, DECEMBER, 1855.

[*Reported in 5 Ohio St., 13.*]

Decision.—This suit was brought against Bailey, as drawer, and Burgess, as indorser, of a paper, of which the following is a copy:

* A check is always payable on presentation and demand, and is not entitled to days of grace.

A draft for money, in the usual form of a check, but payable on a future specified day is a bill of exchange, and entitled to days of grace.

Whether days of grace are to be allowed on a draft in the form of a check depends upon the question whether the instrument is payable on demand, or at a future day.

The usage of banks in any particular place, to regard drafts upon them, payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rule of law in relation to such paper.

¹ This case is cited in Daniel on Negotiable Instruments, 1568, 1569, 1574, 1576, 1587, 1590, 1600, 1638; Randolph on Commercial Paper, 93; Tiedeman on Commercial Paper, 421, 432, 434, 442, 443, 452; Norton on Bills and Notes, 29, 382; Benjamin's Chalmers on Bills, Notes and Checks, 31, 66, 267; Wood's Byles, on Bills and Notes, 57, 280; Illustrative Cases, 40; Paige's Illus-

“\$300.

Cleveland, O., June 30, 1853.

“*Wicks, Otis & Brownell: Pay to L. F. Burgess, on the 13th day of July, '53, or order, three hundred dollars.*

R. B. Bailey.”

Indorsed by “*L. F. Burgess.*”

The paper was presented to Wicks, Otis & Brownell, for payment, on the 16th day of July, 1853; payment refused, and notice of non-payment given on that day.

It is claimed, on the part of the defence, that presentment was not made, and notice given, in due time. And the question for determination is, whether this instrument, upon which suit is brought, is, or is not, entitled to days of grace; and this depends upon the question, whether this instrument is a check *eo nomine*, or a bill of exchange, subject to the rules and usages governing ordinary bills of exchange.

Bills of Exchange and Checks Distinguished.—The distinction between a bill of exchange and a check, although much confused, in some respects, by the apparently inconsistent language of some of the adjudicated cases, as well as some of the elementary writers bearing upon it, is founded in the difference in the nature of these two classes of commercial paper. Checks, being drafts or orders for immediate payment of money, have come into such common use as to supersede, in frequent payments of considerable amounts, not only gold and silver coin, but even bank notes. And with their general use, certain usages have grown up peculiar to that class of instruments, and which have become engrafted on the commercial law of the country.

A check is subject to many of the rules and which regulate the rights and liabilities of parties to bills of exchange, and so nearly resembles the latter class of instruments, that some authors have defined a check to be, in substance and in legal effect, an inland bill of exchange, payable on demand. But,

trative Cases on Commercial Paper, 324. See also *Andrew v. Blachley*, 11 Ohio St., 89; *Stewart v. Smith*, 17 Ohio St., 83; *Merchant's Bank v. State Bank*, 10 Wall, 647; *Culter v. Reynolds*, 64 Ill., 321; *Woodruff v. Merchants' Bank*, 25 Wend., 673; *Bickford v. First Nat. Bank*, 42 Ill., 238; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y., 325.

as Judge Story well said, in the matter of Brown,¹ although a check “nearly resembles a bill of exchange, yet *nullum simile est idem*.” By statute, in Ohio, all bills made negotiable are entitled to three days grace in the time of payment.² But days of grace in the time of payment would be inconsistent with the nature and purpose of a check, which requires on acceptance, and is always payable immediately on presentment.

¹ 2 Story, 502.

² Revised Stat., 576.

Check—Defined.—“A check is a draft or order on a bank or banker, purporting to be drawn on a deposit of funds, for the payment, at all events, of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand. Van Schaack, Bank Checks, 1, citing Blair v. Wilson, 28 Grat. (Va.), 170; Story, Prom. Notes (7th ed.), § 487; 2 Daniel Neg. Inst. (3d ed.), § 1566; Norton on Bills and Notes, 380.

“A check resembles an inland bill of exchange payable on demand, except that it is always drawn on a banker; and many, but not all, of the rules governing a bill, are applicable to it.

“In some, but not all, states, an instrument, in the form of a check, drawn in one state on a banker in another state, is held to be a foreign bill of exchange, and not a check.”

Check—Form Of.—The following is the ordinary form of a check:

Ann Arbor, Mich., Sept. 1st, 1898.

The Ann Arbor Savings Bank,
Pay to Adam Smith or order [or to Adam Smith simply, or to
Adam Smith or bearer, or simply to bearer]
Five hundred and 100/100.....Dollars.
\$500 100/100. *John Jones.*

Check—Presentment and Demand.—A check should be presented and paid promptly. Fegley v. McDonald, 89 Pa. St., 128. Checks are negotiable instruments, and are transferred by indorsement and delivery. Conroy v. Warren, 3 Johns. Cas., 259. The same rules apply to checks, as to presentment and notice of dishonor, as to bills of exchange. Harker v. Anderson, 21 Wend., 372; Pollard v. Bowen, 57 Ind., 234.

Effect of a Delay in Presentment.—When a person receives a check, he must present it for payment within a reasonable time, in order to preserve his right of recourse on the drawer and indorsers in case of non-payment by the drawee. Grange v. Reigh, 93 Wis., 552; Bull v. Bank, 123 U. S., 105; Daniel on Neg. Inst., Secs. 1590, 1591; Gregg v. Beane, 69 Vt., 22. And

These two classes of commercial paper, although in many respects similar, are to be distinguished in the following particulars, to wit:

1. A check is drawn upon an existing fund, and is an absolute transfer or appropriation, to the holder, of so much money in the hands of the drawee; whereas a bill of exchange is not always, or necessarily, drawn upon actual funds in the hands of the drawee, but very frequently drawn in anticipation of funds, or upon a previously arranged credit.

2. The drawer of a check is always the principal; whereas the drawer of a bill frequently stands in the position of a mere surety.

what is considered a reasonable time is within the next secular day. *Grange v. Reigh*, supra; *Gregg v. Beane*, supra; *Holmes v. Roe*, 62 Mich., 199; 28 N. W. Rep., 864; *Bank v. Miller*, 37 Neb., 500; 40 Am. St. Rep., 499; 55 N. W. Rep., 1064; *Gifford v. Hardell*, 88 Wis., 538; 43 Am. St. Rep., 925; 60 N. W. Rep., 1064. The drawer, however, will not be released by the delay unless he has suffered some loss thereby. *Bull v. Bank*, 123 U. S., 105; *Woodin v. Frazee*, 38 N. Y. Sup., 190.

Memorandum Checks—Defined.—Mr. Norton in his valuable work on Bills and Notes says:

“It is necessary to notice shortly a class of checks of a peculiar character, known as ‘memorandum checks.’ In form and appearance a memorandum check does not differ from ordinary checks, except that on the face of them is written the word ‘memorandum,’ or ‘mem.,’ or ‘memo.’ Such a check ‘is given by the maker to the payee rather as a memorandum of indebtedness than as a payment. Between those parties it is considered as a due-bill or an I. O. U. It can be sued upon as a promissory note, without presentment to the bank, whereas the holder of a regular check must first demand its payment at bank, and be refused, before he can maintain an action against the drawer., *Van Schaack, Bank Checks*, 184. The fact that the word ‘memorandum,’ or ‘mem.,’ or ‘memo.’ is written on a check, makes it a memorandum check. The bank, however, is not bound to pay any attention to these words, or to recognize any contract as implied between the maker and payee which gives the check any peculiar character. If such a check is presented for payment, and the drawer has sufficient funds to meet, it the bank must honor it like any ordinary check. If the agreement between the maker and the payee is that it shall not be presented for payment, any remedy of the drawer for the breach of such agreement is solely against the payee. *Morse, banks*, 313.

3. As between the holder of a check and an indorser, demand of payment within due time is essential to the liability of the latter. Where the parties reside in the same place, the holder should present the check on the day it is received, or within business hours of the following day; and when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same, or the next succeeding day, for presentment. But days of grace being allowed to bills of exchange, the time for demanding payment of a bill is different.

4. As between the holder and drawer, however, mere delay in presenting a check in due time for payment would

“A memorandum check presents all the features of other negotiable instruments when transferred or indorsed to a *bona fide* holder for value. Van Shaack, Bank Checks, 185. ‘*A memorandum check is a contract by which the maker engages to pay to the bona fide holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay, upon presentation at maturity, and if due notice of the presentation and non-payment should be given.*’ Franklin Bank v. Freeman, 16 Pick. (Mass.), 535. See also, as to this class of checks, Cushing v. Gore, 15 Mass., 69; Dykers v. Leather Manufacturers’ Bank, 11 Paige (N. Y.), 612; Norton on Bills and Notes, 383. See also, American Emigrant Co. v. Clark, 47 Ia., 671; Franklin Bk. v. Freeman, 16 Pick., 535; U. S. v. Isham, 17 Wall., 496.

Checks—Certification of—Effect Upon Drawer’s Liability.—As has been said, a check is an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money; no previous notice is necessary, no acceptance is required or expected; it has no days of grace. It is payable on presentment and not before. It is the duty of the bank to pay the checks of its depositors when they are presented for payment, if it has sufficient funds on deposit.

By the certification of a check is meant that the banker undertakes to pay the same to any holder upon demand. This certification may be made by a telegraphic promise. Henrietta Nat. Bk. v. State Nat. Bk., 80 Tex., 648; 16 S. W. Rep., 321.

The weight of authority is that if the drawer, in his own behalf or for his own benefit, gets his check certified and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified, instead of getting it paid, then the drawer is discharged. This rule of law seems to be based upon sound reasons. Born v. First National Bank, 123 Indiana, 78; Brown v. Leckie, 43 Illinois, 497; First National Bank v. Leach, 52 N. Y., 350; Continental National

not discharge the latter, unless he had been injured thereby, and then only to the extent of his loss; but a different rule, in this respect, prevails in case of a bill of exchange.

5. A check requires no acceptance, and, when presented, the presentment is for payment.

6. It is not protestable, or in other words, protest is not requisite to hold either the drawer or an indorser.¹

From these distinguishing characteristics, arising out of the nature of these two classes of instruments, it follows that

¹This rule is now changed by statute in some of the states so that all negotiable instruments must be protested when dishonored.

Bank v. Cornhauser, 37 Ill. App., 475; Minot v. Russ, 156 Mass., 458; Bank v. Whitman, 94 U. S., 343; Bank v. Jones, 27 N. E. R., 533; Larsen v. Breene, 12 Colo., 480; Bank v. Miller, 77 Ala., 168.

Check—Payment Upon Unauthorized Indorsement.—If the bank or drawee of a check pays it upon an unauthorized indorsement, it is liable for the amount of the check to the true holder on demand. First National Bank v. Whitman, 94 U. S., 343; 10 Wall., 152; Dodge v. National Exchange Bank, 20 Ohio State, 234; Citizen's Nat. Bk. v. Importer's & Trader's Bk., 119 N. Y., 195; 23 N. E. Rep., 540; Bank of British N. A. v. Merchant's Bk., 1 N. Y., 111; Vicks v. Bank, 101 N. Y., 563; Marzetti v. Williams, 1 Barn. & Adol., 415; Corn Exchange Bk. v. Nassau Bk., 91 N. Y., 74.

Check—Liability of Banker for Failure to Honor.—Whenever a banker receives money on deposit, he impliedly contracts thereby with the depositor that he will pay checks drawn upon him to the amount of such deposit, and a failure to comply with such implied contract entitles the depositor to recover any damages that he may suffer by reason of such failure. The banker, however, must be given a reasonable time after the deposits are made, to enter the credit on his books. Marzetti v. Williams, 1 Barn. & Adol., 415; National Bank v. Peck, 127 Mass., 298.

Coupon Bonds—Defined.—Coupon bonds belong to commercial contracts in the sense that they are negotiable contracts. They are not, however, subject to all the rules of commercial paper, but are governed by special rules and customs. Daniel in his work on Negotiable Instruments says, that "a bond is an instrument complete in itself, and yet composed of several distinct instruments each of which is in itself as complete as the whole together. As originally issued the coupon bonds consisted of (first) an obligation to pay a certain amount of money at a future day; and (second) annexed to it is a series of coupons each one of which is a promise for the payment of a periodical installment of

a check is always payable on presentation and demand; and that, if a draft for money be in the usual form of a check, except that it is payable on a specified day in future, it is a bill of exchange and entitled to days of grace. This is the result of the doctrine of the most recent and well considered authorities having a bearing upon this subject.¹

¹ Bowen et al. v. Newell et al., 4 Selden, 190; Brown v. Lusk, 4 Yerger, 240; Daniels v. Kyle et al., 1 Kelley (Ga.), 304; Woodruff v. Merchants' Bank, 25 Wend., 673, 6 Hill, 174; Chitty on Bills, 512, 515; Byles on Bills, 71; Story on Prom. Notes, secs. 481-491; 3 Kent's Com., 104.

interest. The contract between the payer and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest without presenting the bond by separating and presenting the proper coupon, and it also enables him to anticipate his interest by negotiating the coupon which represents it to another person at any time before its maturity." Dan. on Negot. Inst.; Morris Canal and Banking Co. v. Fisher, 64 Am. Dec., 428, and cases there collected; McClelland v. Norfolk R. R. Co., 110 N. Y., 397-401; Commissioners v. Aspinwall, 21 How. (U. S.), 539; Frank v. Wessels, 64 N. Y., 155.

These coupon bonds, which are usually issued by corporations, but may be issued by private persons, constitute or represent a vast portion of the wealth of the country. They may be transferred by delivery or indorsement; and the purchaser of them in good faith takes them freed from all equities, and the burden of proof on the question of such good faith lies on the part of him who assails the title.

Coupon—Defined.—The term "coupon" is derived from the French "couper"—to cut—and is defined by Worcester, in his dictionary, to signify "one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made; so called, because it is cut off when it is presented for payment." Coupons resemble promissory notes in form more than any other kind of negotiable instruments. They may, however, be in the form of drafts, or orders, or checks. It is said that they differ from bills of exchange inasmuch as they are not intended for acceptance when drawn upon a bank. They are independent securities and may be separate from the bond from which they are originally attached and in this condition are in legal effect negotiable in the same manner and affected with the legal attributes of all negotiable paper. Ketchum v. Duncan, 96 U. S., 659; Town of Cicero v. Cifford, 53 Ind., 191; White v. Vt. & Mass. R. R. Co., 21 How. (U. S.), 575; City of Memphis v. Brown, 5 Am. Law Times, 424; Trustees v. Lewis, 34 Fla., 424; 43 Am. St. Rep., 209; Morris Canal and Banking Co. v. Fisher, *supra*.

It is also settled, in *Woodruff v. Merchants' Bank*, and *Bowen v. Newell*, above referred to, that any supposed usage of banks in *any particular place* to regard drafts upon them, payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rules of the law in relation to such paper.

Motion for new trial overruled, and judgment for the plaintiff.

These coupons, however, to be negotiable must bear upon their face the indicia of negotiability—that is, they must be payable to a particular person or order, or bearer, and must also contain all the other essentials of negotiable contracts. *Augusta Bank v. Augusta*, 49 Me., 507; *Smith v. Clark Co.*, 54 Mo., 58; *Johnson v. County of Stark*, 24 Ill., 75; *Haven v. Grand Junction R. R. Co.*, 109 Mass., 88; *McClelland v. Norfolk R. R. Co.*, 110 N. Y., 397.

CHAPTER XXI.

Quasi-Negotiable Contracts.

SECTION 61.

QUASI-NEGOTIABLE CONTRACTS ENUMERATED AND DEFINED.

Letters of Credit—Defined.—A letter of credit may be defined to be a letter of request, whereby one person requests some other person to advance money or give credit to a third person, and promises that he will pay or guarantee the same to the person who makes the advancement, or accept bills drawn upon himself for a like amount.¹

A letter by one person to another requesting the latter to make advances to a third person on the credit of the former is a letter of credit.

Letters of credit are of two kinds, general and special. A general letter of credit is addressed to any and every person, and therefore gives any person to whom it may be shown authority to advance upon its credit. The privity of contracts springs up between him and the drawer of the letter and it becomes in legal effect the same as if addressed to him by name. While a special letter of credit is one addressed to a particular individual by name, and is confined to him and gives no other person a right to act upon it. Letters of credit may further be subdivided into those that contemplate a single transaction and those that contemplate an open and continued credit embracing several transactions. In the latter case they are not generally confined to transactions with a single individual, but if the nature of the business requires it, different individuals are authorized to make advancement upon

¹ Dan. on Negot. Inst., Sec. 1790.

it, and it then becomes a several contract with each individual to the amount advanced.¹

The following is a sufficient form for a letter of credit:

"Ann Arbor, Mich., Sept. 1st, 1898.
"To Barring Bros.,
London, England.

Sirs:—

"The Ann Arbor Savings Bank" hereby agrees to accept and pay at maturity any draft or drafts on it at sixty days sight issued by you, to the extent of \$5,000.

Chas. E. Hiscock, Cashier."

Letters are commonly used by tourists throughout the world. In almost every city there are certain banking firms which make a special business of furnishing travelers with these letters of credit.

United States Treasury Notes—Defined.—The treasury notes of the United States, payable to bearer, are negotiable commercial contracts and their transferability is subject to the commercial law of other paper of that character. If such paper is payable at a definite future time, one who becomes the holder of such paper after such time takes it subject to the rights of antecedent holders to the same extent as any other paper bought after its maturity.²

Bank Notes—Defined.—A bank note has been defined to be a promissory note made by a banker, payable to bearer on demand and intended to circulate as money. Mr. Daniel says that "it is the note of an incorporated bank designed to circulate like money and payable to bearer on demand."³

The terms "bank notes" and "bank bills," says Mr. Daniel, in his valuable work on Negotiable Instruments, "are

¹ *The Union Bank of La. v. The Executors, etc.*, 3 N. Y., 203; *Russell v. Wiggins*, 2 Story's Rep., 214.

² *Vermilye Co. v. Adams Express Co.*, 21 Wall., 138; *Densmore, etc. v. Duncan, etc.*, 57 N. Y., 573.

³ *Dan. on Negot. Inst.*, Sec. 1664; *Townsend v. People*, 4 Ill., 326, where Butterfield, J., said that "a bank note is a written promise on the part of the bank to pay to the bearer a certain sum of money."

of the like significations, and for the purposes of interpretation both in criminal and civil jurisprudence are equivalent and interchangeable.”¹

In the case of *Miller v. Race* (1758), *Ld. Mansfield* said that “bank notes are treated as money—as cash in the ordinary course and transaction of business—by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payment as money or cash, and are never considered as securities for money, but as money itself.”²

While “bank notes” in ordinary business transactions are treated as money, they are not money in the strict sense of that term. They are negotiable instruments, however, and pass from hand to hand by delivery simply. As a general rule the transferrer of a bank note makes all the warranties of a transferrer of other negotiable contracts.³

They may be transferred also by indorsement, in which case the indorser would be liable in the same way and to the same extent as if his indorsement had been placed upon an ordinary promissory note or bill of exchange.⁴

Bank notes are intended for indefinite circulation, and as long as they continue to circulate they are never due and therefore the statute of limitations will never run against them. It is held, however, that if they cease to circulate the statute does begin to run.⁵

Neither are they discharged because they have been redeemed by the bank which issued them, but may be issued

¹ *Dan. on Negot. Inst.*, Sec. 1664; *Eastman v. Commonwealth*, 4 Gray, 416.

² 1 Burr, 452.

³ *Dan. on Negot. Inst.*, sec. 1675-79.

⁴ *Ramsdale v. Horton*, 3 Pa. St., 330; *Corbett v. Bank of Smyrna*, 2 Harr. (Del.), 235; *Westfall v. Braley*, 10 Ohio St., 188; *Gilman v. Peck*, 11 Vt., 516; *Bayard v. Shunk*, 1 Watts & S., 92.

⁵ *Kimbrow v. Bank of Fulton*, 49 Ga., 419; *Solomons v. Bank of England*, 13 East, 135; *Morse on Banking*, 402.

again and again, and kept in circulation during the corporate existence of the bank.¹

Gold and Silver Certificates.—The treasurer of the United States has been authorized to issue what are known as “gold and silver certificates.” These certificates are intended to circulate as money, but, like bank notes, are not money. They are negotiable and pass from hand to hand by delivery simply. They contain a certificate that “there have been deposited in the treasury of the United States gold (or silver) dollars payable to bearer on demand.” It has been held, however, that a “silver certificate” is not, in common parlance, a promissory note, and evidence that one stole a “silver certificate” is not admissible against one charged with stealing a “promissory note.”²

Bills of Lading—Defined.—A bill of lading may be defined to be “a formal acknowledgment of the receipt of goods and an engagement to deliver them to the consignee or his assigns.”³

A bill of lading serves a two-fold capacity: (1) It is a contract for the transportation of the goods, as well as (2) a receipt for the goods. As a receipt for the goods, it is *prima facie* evidence of the quantity, condition and quality of the goods received.

A bill of lading is not a negotiable instrument in the sense that a bill or note is. It represents goods, wares and merchandise and not money. It may be transferred by indorsement or delivery, and will thus operate to transfer or deliver all the right and title to the goods, wares and merchandise which it represents, so that the indorsee may have a good title to the same as against the transferrer. Several of the states have by statute made bills of lading absolutely negotiable. It was said in the case of *Shaw v. Railroad Co.*, that

¹ Parsons on Bills and Notes, 95; Dan. on Negot. Inst., sec. 1683.

² Stewart v. State, 62 Md., 412.

³ Empire Transportation Co. v. Wallace, 68 Pa. St., 302; Merchants Bank v. Hewitt, 3 Iowa, 93; Merchants Bk. v. Union, etc. Co., 69 N. Y., 373, and cases cited; Barnard v. Campbell, 55 N. Y., 456.

“although a statute makes a bill of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to all the indorsements of bills and notes ensue or intended to ensue from such negotiation.”¹

A thief or the finder of a negotiable contract may in certain cases transfer it so that the transferee may be a *bona fide* holder of such contract. This is not true in the case of a bill of lading. A thief or a finder of a bill of lading cannot divest the true owner of the title to the goods, wares and merchandise by transferring the same to an innocent party.²

Warehouse Receipt—Defined.—“A warehouse receipt” may be defined to be a receipt given by a warehouseman for goods received by him for storage. These receipts, like bills of lading, are the representatives of the goods, wares and merchandise for which they were given. These certificates may be transferred either by indorsement or by delivery, and which transfer operates as effectually to transfer the goods as the actual transfer of the goods themselves. While their transfer operates to pass the title to the goods which they represent, they are not absolutely negotiable, for the reason that their transfer cannot operate to deprive the real owner of the goods of his title thereto. In many of the states these instruments have been made negotiable, under certain rules and regulations, by statute.³

Warehouse receipts are not negotiable so as to enable the person holding them to transfer a greater right or title to the property mentioned in them than he has himself. The delivery of the receipt has the same effect as the delivery of the property.⁴ In the absence of statutory provision warehouse

¹ 100 U. S., 557.

² Shaw v. R. R. Co., supra; Price v. Wis. Co., 43 Wis., 267; Emery v. Irving Nat. Bk., 25 Ohio St., 255; Barnard v. Campbell, 55 N. Y., 462; Friedlander v. Texas Ry. Co., 130 U. S., 416.

³ Cleveland v. Sherman, 40 Ohio St., 176; Conrad v. Fisher, 37 Mo. App., 367; State v. Loomis, 27 Minn., 521; Nat. Bk. v. Wilder, 34 Minn., 149; Brooks v. Hanover Nat. Bk., 26 Fed. R., 301.

⁴ Burton v. Curyea, 40 Ill., 320; 89 Am. D., 350, 361.

receipts are not negotiable instruments in the sense that bills and notes are. They do not call for the payment of money.¹

Receiver's Certificate—Defined.—“Receiver's” are authorized under certain circumstances, by authority of the court, to issue certificates, certifying that a given amount is due for labor, materials or supplies. This certificate becomes a lien against the property controlled by the receiver and takes priority over mortgage indebtedness and will be paid out of the proceeds in a foreclosure proceeding before the original indebtedness. The effect of granting these certificates by a receiver is to create a new lien against the property and which will be paid prior to the lien held by the mortgagees or bond holders. They are usually negotiable in form and pass upon delivery so that the transferee may enforce the payment of the same by an action thereon; but nevertheless they are not commercial contracts in the sense that an innocent purchaser will be protected against equities.²

Certificates of Stock—Defined.—A certificate of stock, is a certificate of a corporation or joint stock company, that the person named therein is the owner of a designated number of shares of the stock of such corporation or joint-stock company. They may be negotiable in form but are not strictly negotiable instruments. If they are negotiable in form the holder may transfer by indorsement all his claim represented thereby against the company or corporation so that the company would be liable to the transferee. The corporation may, and usually does provide how its certificates of stock may be transferred in which case the corporation would not be liable to any holder of the stock to whom it has been transferred contrary to the rule of the corporation. Neither may a thief or the finder of a certificate of stock deprive the right-

¹ *Rice v. Cutler*, 17 Wis., 351; 84 Am. D., 747; *Robson v. Swart*, 24 Minn., 371; 100 Am. D., 238; *Ins. Co. v. Kiger*, 103 U. S., 352; *Planter's Mill Co. v. Merchant's Nat. Bk.*, 78 Ga., 582.

² *Wallace v. Loomis*, 97 U. S., 146; *Meyer v. Johnston*, 53 Ala., 237; *Union Trust Co. v. Ill. R. R. Co.*, 117 U. S., 434; *Swan v. Clark*, 110 U. S., 602; *Turner v. Peoria R. R. Co.*, 75 Ill., 134; *Humphreys v. Allen*, 101 Ill., 490; *McCurdy v. Bowes*, 88 Ind., 583; *Bank of Montreal v. Thayer*, 7 Fed. R., 622.

ful owner of his right and interest therein by an indorsement and transfer of the same.¹

Due Bill—Defined.—A due bill is simply an acknowledgement of a debt without any express promise to pay the same. The following are illustrations of due bills: I. O. U.; due “A.” \$50; I acknowledge myself indebted to “B.” in the sum of \$100.²

¹Shaw v. Spencer, 100 Mass., 382; 97 Am. D., 107; Graves v. Mining Co., 81 Cal., 325; Allen v. Pegren, 6 Iowa, 173; Johnston v. Laffin, 103 U. S., 804; Farmer’s Bank v. Wasson, 48 Iowa, 338; Hammond v. Hastings, 134 U. S., 401; Leitch v. Wells, 48 N. Y., 586, 613; McNeil v. Tenth Nat. Bk., 46 N. Y., 325.

²Fisher v. Lealie, 1 Esp., 425; Israel v. Israel, 1 Camp., 499; Currier v. Lockwood, 40 Conn., 348; Smith v. Allen, 5 Day (Conn.), 337; Hegeman v. Moon, 131 N. Y., 462; Brooks v. Elkins, 2 Mees. & Wels., 74; Schmitz v. Hawkeye Gold Mining Co., 67 N. W. Rep., 618; Hussey v. Winslow, 59 Me., 170; See Sec. 13, p. 72 of this text.

CHAPTER XXII.

Conflict of Laws.

SECTION 62.

WHERE A NEGOTIABLE CONTRACT IS EXECUTED AND DELIVERED AT ONE PLACE TO BE PERFORMED AT ANOTHER AND THE RATE OF INTEREST IS DIFFERENT AT THE TWO PLACES, THE PARTIES MAY STIPULATE WITH REFERENCE TO THE LAWS OF WHICH PLACE SHALL GOVERN.

KILGORE *v.* DEMPSEY.¹

IN THE SUPREME COURT, OHIO, DEC. 1874.

[*Reported in 25 Ohio St., 413; 18 Am. Rep., 306.*]

The Form of the Action.—Motion for leave to file petition in error to reverse the District Court of Pike County.

Andrew Kilgore executed to Richard Dempsey the note upon which this action was brought, of which the following is a copy:

“ \$7,000.

Piketon, O., May 29, 1856.

“ *Two years after date I promise to pay to the order of Richard Dempsey the sum of seven thousand dollars, at the Bank of Pennsylvania, Philadelphia, with interest at the rate of ten per cent. per annum—the interest to be payable semi-annually, at the end of every six months from this date, at said Bank.*

Signed:

Andrew Kilgore.”

¹This case is cited in Daniel on Negotiable Instruments, 922, 923; Tiedeman on Commercial Paper, 511. See also, Potter v. Tollman, 35 Barb., 182; Richards v. Globe Bk., 12 Wis., 692; DePaw v. Humphreys, 20 Mart. (La.), 1; Edwards on Bills, 183; Miller v. Tiffany, 1 Wall., 310; Staples v. Nott, 28 N. E. Rep., 515; Sheldon v. Haxtun, 91 N. Y., 124; Bank v. Low, 81 N. Y., 566.

Kilgore resided in Pike County, Ohio, and Dempsey in Philadelphia, at the date of the note, but both parties were present at Piketon when the transaction was concluded. A mortgage on lands in Pike County was given by Kilgore to secure the amount of the note and interest. At the date of the note the stipulated rate of interest was lawful in Ohio, but illegal in Pennsylvania, where the legal rate was six per cent. and no more.

The interest was paid on the note up to May 29, 1871. Dempsey commenced an action to foreclose his mortgage in Pike Common Pleas on the 26th of June, 1872.

Kilgore set up two defenses: (1) That under the laws of Pennsylvania the contract was usurious; and (2) that Dempsey was entitled to recover only six per cent. interest on the note.

A demurrer, to both of these defenses, was sustained as to the first, and Kilgore thereupon asked and obtained leave to file an amendment to his second defense.

The District Court affirmed the decree of the Common Pleas. The object of this motion is to obtain leave to file a petition in error to reverse the judgment of the District Court.

The principal errors assigned are: 1. That the District Court erred in sustaining the demurrer to the first defense.

There are other errors assigned; but we do not find them well taken, and they are not of sufficient importance to require further notice.

The Claim of the Plaintiff in Error (defendant below). —The plaintiff in error argued: 1. That his note is to be regarded as a contract made in Pennsylvania, and must be governed by the laws of that state.

The precise question raised is: Where a note is executed in one state, expressing a rate of interest authorized by the laws of that state, but expressly being made payable in another state, where the law does not authorize so high a rate, in a suit upon the note, the laws of which state are to govern?

When a note is made in a state where the rate of interest is less than in a state where the same is to be paid, the higher rate may be collected.¹

¹ Story's Con. of Laws, secs. 291-293a, 298-306, and note to each section; Edwards on Notes and Bills, secs. 180, 182, 183, and notes.

The note is governed by the law of the place where made payable.¹ There is no good reason for making the rule in cases like this an exception to the rule that applies to all other personal contracts.²

2. If the note was governed by the laws of Ohio, the agreement to pay exchange made the contract usurious. This was a shift or device to get more than legal interest.³

The Claim of the Defendant in Error (plaintiff below).—The defendant in error argued: 1. That the *lex loci contractus* of personal contracts determines their nature and validity. If valid where made, they are valid everywhere. If invalid where made, they are invalid everywhere.⁴

2. If a note or bill be executed in one country and made payable in another, the parties may, by agreement, elect the rate of interest of either country without incurring the penalties of usury.⁵

3. When the maker of a note resides in one state, and the payee in another, the parties may fix upon the residence of the maker as the place of payment, in which case they may stipulate that, in addition to legal interest, the debtor shall

¹ Parsons on Notes and Bills, 324-327, 333-336, and 376-380 and notes; 43 N. H., 113; Tyler on Usury, 79-90; Scofield v. Day, 20 Johns., 102; Healey v. Gorman, 3 Green, 328; Vinson v. Platt et al., 21 Ga., 135; 2 Parsons on Notes and Bills, 376, note c.

² Butler v. Meyer, 17 Ind., 77; Little v. Riley, 43 N. H., 109; Boulton v. Street, 3 Coldwell, 31; Bigelow, 162.

³ 2 Parsons on Notes and Bills, 426; 6 Ohio St., 19; 1 Ohio St., 409; 12 Ohio St., 544; 13 Ohio, 1; 5 Ohio St., 266; 10 Ohio, 378; Tyler on Usury, 335-338; Butick v. Harries, 3 Am. L. Reg., 112; Cornell v. Barnes, 26 Wis., 473.

⁴ 2 Kent's Com., 458; 2 Parsons on Notes and Bills, 378; Andrews v. Pond, 13 Pet., 77; De Wolf v. Johnson, 10 Wheat., 367; Dunscomb v. Bunker, 2 Met., 8; Mix v. Insurance Co., 11 Ind., 117.

⁵ 2 Kent, 460, 461; Depaw v. Humphreys, 10 Martin, 1; 2 Parsons on Contracts, 583-585, and note (5th ed.); 1 Paige, 220; Andrews v. Pond, 13 Pet., 65; Peck v. Mayo, 14 Vt., 33; Chapman v. Robinson, 6 Paige, 627; Edwards on Bills, 717; 2 Parsons on Notes and Bills, 336, 337, 377, 378.

also pay the creditor the current exchange between the two places, and the note will not be usurious.¹

Decision.—The question under the first assignment of error, arises out of the conflict of the laws of Ohio and Pennsylvania relative to the legal rate of interest. Its determination has been greatly aided by the ability with which it has been discussed and presented on principle and authority. It is conceded by counsel for plaintiff in error, that the authorities are conflicting on the subject, and this is apparent from an examination of those cited.

It is observable, however, that few of the cases cited decide the precise question here presented. Some of them present questions of fact as to where the contract was executed, which had to be determined before the law was applied. Others are cases in which a note bearing interest, but no rate stipulated, was made in one country and payable in another, the laws of which were in conflict on the subject of interest; and the question was whether the rate of interest in the country where the contract was made, or that in which it was to be performed, should control. In others, notes which did not bear interest till due, were made in one state and by their terms payable in another, where there was like conflicts in the laws, the question was, whether damages allowed for detaining the money after it was due, should be measured by the rate of interest at the place the contract was made, or that at which it was to have been performed. As the decisions in these cases, and others referred to which are not directly in point, would throw but little light on the question here, a review of them will not be attempted.

But coming to another class of authorities more directly in point, and in which there is likewise a conflict, we are left to decide between them. *According to some of these authorities, if a note is made payable at a designated place, it must in respect to interest conform to the law of the place of pay-*

¹ 3 Parsons on Contracts (5th ed.), 136, and authorities cited; Edwards on Bills, 360; Merritt v. Benton, 10 Wend., 116; Cayuga Bank v. Hunt, 2 Hill, 635; Curwen, 1524; Swan, 1854, p. 99, sec. 61; Buckingham v. McLean, 13 How., 212; Southern Bank v. Brashears, 1 Disney, 207.

ment, without reference to the place where it was made or signed.

According to others, if a note is made in one state and payable in another, and the interest laws of such states are in conflict, the laws of either state may be applied; in other words, that such a note may have two different places the laws of which may enter into its construction.

This latter point is supported by a few authorities directly in point, and which, in our opinion, establish the rule that ought to be followed.

In *Depaw v. Humphreys*,¹ the note was given in New Orleans, payable in New York, for a large sum of money, bearing interest at ten per cent., being legal interest in Louisiana, the New York legal interest being seven per cent. only. The question was whether the note was usurious, and therefore void, as it would be if made in New York. The Supreme Court of Louisiana decided that it was not usurious and that, although the note was made payable at New York, yet the interest might be stipulated for, either according to the law of Louisiana, or according to that of New York. The court expressly said: "That in a note executed here (New Orleans) on

¹ 10 Martin (La.), p. 1.

In the case of *Miller v. Tiffany*, persons—Palmer of New York and Wallace of Cleveland, O., assignees of insolvent firms, sold to one Miller of Ft. Wayne, Ind., goods to the amount of \$20,000, taking a note secured by a mortgage. On this note the action was brought, the note being drawn in Indiana and made payable in Cleveland, O., the bargain for the goods being concluded in New York. Legal interest in New York was 6 %, in Indiana 7 %, in Ohio 10%, and the note called for 10% interest.

Justice Swayne, of the U. S. Supreme Court, in his decision said: "The general principle in relation to contracts made in one place to be performed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest of the place of performance is higher than that permitted in the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of contract than at the place of performance, the parties may lawfully contract in that case also for the higher interest." 1 Wall, 298.

In the 35 N. J. L., there was a case of a bill drawn in Illinois and delivered to drawee in New York, and was governed by the

a loan of money made here, the creditor may stipulate for the legal rate of interest authorized by our law, although such a rate be disallowed in the place (New York) at which payment is to be made." This is the exact question here. In *Peck v. Mayo*,¹ the notes sued on were made at Montreal, Canada, where the makers resided, payable in Albany, New York. The lawful rate of interest in Montreal was six per cent., and in New York seven per cent. per annum. Redfield, J., in delivering the opinion of the court, after an examination of all the authorities, said: "If a contract be entered into in one place to be performed in another, and the rate of interest differ in the two countries, the parties may stipulate for the rate of interest of either country, and thus, by their own express contract, determine with reference to the law of which

¹ 14 Vermont, 33.

laws of the latter place, but if in good faith the bill had been made payable in the former state any rate of interest not exceeding that there allowed, might have been reserved.

In the case of *Townsend v. Riley*, the defendant had given his note for \$2,000, secured by a mortgage on his property in New Hampshire. He afterwards removed to New York, and by subsequent agreement promised to pay the rate of interest of New York. Justice Bellows in delivering the opinion of the Supreme Court of New Hampshire, entered very fully into the discussion of the validity of interest allowed in cases where the laws of the states conflict. He said: "The question arises whether the parties to a contract made in one state and payable in another may lawfully stipulate for the interest of the state where the contract is made, although higher than is allowed in the state where the money is payable. Upon careful consideration of the authorities bearing upon this question, we think that the parties may stipulate for the interest of either state unless the arrangements be entered into merely as a cover for usury. If then the contract was made in New York in good faith, and not to avoid the usury laws of New Hampshire, it must be regarded as valid although the New York rate of interest was higher than that of New Hampshire. These views are sustained by decided cases in New York, Vermont and Louisiana, *and none of an opposite character have been brought to our notice.*" 46 N. H., 300.

For further authority in the same line see:—25 Ohio, 413; 2 Kent, 460–461; 2 Parsons on Con., 583–5; 1 Page, 220; 13 Peters, 65; 14 Vermont, 33; 6 Paige, 627; Edwards on Bills, 717; Parsons on Notes and Bills, 336–7, 377, 378; 22 Iowa, 194. Tiedeman on Commercial Paper, page 798, says: "In order to carry out the intention of parties to legal transactions their contracts must be

country that incident of the contract shall be decided." In *Chapman v. Robertson*,¹ the plaintiff resided in England, where the legal rate of interest was lower than in New York, where it was seven per cent. per annum. The contract for the loan was made in England, but the bond was to be secured by a mortgage on lands in New York, and the arrangement made and carried out was, that Robertson was to execute the bond bearing seven per cent. interest, and execute and record the mortgage securing it in New York, and then

¹ 6 Paige, 627.

construed in the light of that law which the parties themselves had in contemplation." In support of which, see *Bank v. Morris*, 1 Hun., 680; *Bank of State of Ga. v. Lewis*, 45 Barb., 340. See further, *Olcott v. Rathbone*, 5 Wend., 492; *Welsh v. Arlington*, 23 Cal., 322; 8 Pick., 522; 16 Pick., 22.

Mr. Parsons in his work on Bills and Notes lays down the following propositions:

1. That if a bill or note be payable in a particular place it is to be treated as if made there without reference to the place where it was written, signed or dated.

2. That if, by the express terms of a bill or note, or by legal construction of its terms, it is payable specially in any place it is presumed that both parties knew this fact.

3. It is presumed that both parties knew the law of the place in which the paper is payable.

4. That both parties intended that this law should govern the contract. 2 Parsons Bills and Notes, 324.

If the contract is made in one place and it is agreed to be performed in another place, the law of the place of performance instead of the *lex loci contractus* will govern the contract. But the place of payment, unless there is an *express* agreement to the contrary, is presumed to be the same as where the contract is made. Story Conflict of Laws, § 280; Tiedeman Commercial paper, § 508.

In *Goddin v. Shipley*, 7 B. Mon., 577, C. J. Marshall says: "The general principle that a contract referring by its own terms to a particular place where it is to be performed is to receive its construction and legal character and effect from the laws of the place thus referred to, is in itself so obviously reasonable and on the score of authority so well established as to preclude all discussion as to its correctness."

This proposition is supported by the following cases: *Cook v. Moffatt*, 5 How., 295; *Woodruff v. Hill*, 116 Mass., 310; *Drake v. Found Treas. Mining Co.*, 53 Feb., 474; *Blodgett v. Durgin*, 32 Vt., 364; *Hunt v. Standard*, 15 Ind., 33; *Freeman's Bank v. Puckman*, 16 Grat., 126; *Robinson v. Bland*, 2 Burr, 1077; *Kaufman v. Bank of Ky.*, 41 Miss., 212.

forward them to England, where Chapman placed the amount of the bond with Robertson's banker to his credit. It was held that this transaction was not usurious.

From these authorities, and on principle, we are of opinion that Kilgore and Dempsey had a legal right to contract with reference to the laws of either Ohio or Pennsylvania, as they might in good faith agree, and that the note made in Ohio, by which Kilgore agreed to pay ten per cent. interest and principal at Philadelphia, where six per cent. was the legal rate of interest, was not, therefore, usurious. The demurrer to this defense was properly sustained.

Motion overruled.

The general conclusion is that the validity of contracts for notes of interest depends upon the laws of the place where the contract is made and payable, whether it be in the domicile of the debtor, or in that of the creditor, or in that where the property hypothecated is situated or elsewhere. Story Conflict of Laws, 294.

The question whether a contract is usurious or not depends upon the validity of the interest in the country where the contract is made and is to be executed. Story Conflict of Laws, 292, 304; *Andrews v. Pond*, supra; *Pratt v. Wallbridge*, 16 Ind., 54; *McAllister v. Smith*, 17 Ill., 328.

It is in accord with the weight of authority that where two parties make a contract of loan in one state, to be performed in another, they may, acting in good faith, and without the intent to evade the law, agree that the law of either shall control the rate of interest. *Smith v. Parsons*, 55 Minn., 528-9; 1 *Randolph Com-Paper*, § 28; *Brown v. Gardner*, 4 B. J., Lea, 156; *Pomeroy v. Ainsworth*, 22 Barb., 126-8-9; *Arnold v. Potter*, 22 Ia., 198.

Where a contract is made with reference to the place of performance, as is generally the case, the law of the place of contract yields to the law of the place of performance. *Fanning v. Consequa*, 17 Johns, 510-18; *Shillits v. Reineking*, 30 Hun., 345.

For further authorities on the proposition that the place of payment or performance will govern the construction and validity of a contract, see, *Sands v. Smith*, 1 Neb., 108; *Matthews v. Paine*, 47 Ark., 54; *Prior v. Wright*, 14 Ark., 189; *Tyler v. Trahue*, 8 B. Mon., 306; *Cox & Disk v. U. S.*, 6 Pet., 173, 203; *Denny v. Williams*, 5 Allen, 1; *Bell v. Bruen*, 1 How., 182; *Hyde v. Goodnow*, 3 Comst., 36q; *Staples v. Nott*, 28 N. E. Rep. (N.Y.), 515; *Lee v. Selleck*, 33 N. Y., 615; *Bank v. Low*, 81 N. Y., 566; *Transportation Co. v. Kilderhouse*, 87 N. Y., 430; *Sheldon v. Haxtun*, 91 N. Y., 124; *Bigelow v. Burnham*, 49 N. W. Rep. (Ia.), 104; *Burrows v. Stryker*, 47 Ia., 477; *Orcutt v. Hough*, 54 N. H., 472; *Scott v. Perlee*, 39 Ohio st., 63; *Martin v. Johnson*, 10 S. E. Rep., 1092; 8 L. R. A., 170; *Daniel on Neg. Inst.*, sec. 922; *Story on the Conflict of Laws*, secs. 242, 280, 281.

CHAPTER XXIII.

Sureties or the Contract of Suretyship.

SECTION 63.

THE CONTRACT OF SURETYSHIP OR OF SURETY CORRESPONDS IN MANY RESPECTS WITH THAT OF GUARANTY, BUT MANY IMPORTANT DIFFERENCES EXIST, WHICH SHOULD BE CAREFULLY NOTED.

Surety—Defined.—The contract of surety may be defined as *an original undertaking to answer for the debt, default or miscarriage of another.*

Form of the Contract.—It may be stated as a general rule that no particular form is required. It may or may not be in writing. But when connected with a commercial contract, it must be written.¹

Consideration of.—1. If the contract of suretyship is executed and delivered at the same time and as a part of the principal negotiable contract, then the same consideration which supports the negotiable contract is sufficient to support the contract of suretyship. *Leonard v. Vredenburg*,² *Parkhurst v. Vail*.³

2. If the contract of suretyship is executed and delivered at a different time than the principal contract, there must be some new consideration.⁴

¹ Tiedeman on Bills and Notes, Sec. 158; *Allen v. Harrah*, 30 Ia., 363; *Larrusse v. Barker*, 3 Wheat., 101.

² 8 Johns., 29.

³ 73 Ill., 343; *Moses v. Lawrence Co. Bk.*, 149 U. S., 298; *Leonard v. Vredenburg*, 8 Johnson, 29.

⁴ *Leonard v. Vredenburg*, supra; *Rigby v. Norwood*, 34 Ala., 129; *Star Wagon Co. v. Swezey*, 63 Ia., 520; *Draper v. Snow*, 20 N. Y., 331; 75 Am. Dec., 408; *Good v. Martin*, 94 U. S., 90; *Evansville Nat. Bk. v. Kaufman*, 93 N. Y., 273; 45 Am. Rep., 204; *Williams v. Williams*, 67 Mo., 667; *Seyfert v. Harrison*, 88 Ky., 461; *Farmer v. Perry*, 70 Ia., 358.

Negotiability of.—1. Being a common law contract, it is therefore not negotiable.

2. But when connected with and made a part of a negotiable commercial contract, the weight of authority is that it passes with the commercial contract.¹

Grace.—Inasmuch as the contract of suretyship is a common law contract, it is not entitled to grace as a distinct contract. But when it is connected with and made part of a commercial contract, no liability can arise upon it until the lapse of grace.

Presentment, Demand, Notice of Dishonor—Necessity for.—It may be stated as a general rule that presentment, demand and notice of dishonor are not necessary in order to render a surety liable. *A surety is bound with his principal as an original promisor, and his obligation is equally absolute.*² Mere delay of the creditor to sue the principal will not discharge a surety.³

Liability of Sureties.—A surety is liable as follows:

1. He is liable for the amount of the contract;
2. He is liable with the principal and at the same time;
3. He is liable alone and independently of the principal;
4. He may be sued before the principal;
5. He is liable without presentment and demand, unless those steps are required by the terms of his contract.

Surety's Liability—How Discharged.—1. It may be stated as a general rule that whatever discharges the principal discharges the surety. But the principal may be discharged

¹ Barlow v. Meyers, 64 N. Y., 41; 21 Am. Rep., 547; First Nat. Bk. v. Carpenter, 41 Ia., 518; McLaren v. Watson, etc., 20 Wend., 425; 37 Am. Dec., 260; Gage v. Mechanics Bk., 79 Ill., 62; Ellsworth v. Harmon, 101 Ill., 274; Green v. Burroughs, 47 Mich., 70; Baldwin v. Dow, 130 Mass., 416; Jones v. Dow, 142 Mass., 130; 7 N. E. Rep., 839.

² Roberts v. Hawkins, 70 Mich., 566; 38 N. W. R., 575; Gage v. Bank, 79 Ill., 62; Davis Sewing Machine Co. v. Jones, 61 Mo., 409; Dole v. Young, 24 Pick., 252; Parkhurst v. Vail, 73 Ill., 343; Green v. Thompson, 33 Ia., 293.

³ Lenox v. Prout, 3 Wheat., 524, Powell v. Waters, 17 Johns., 176; Rodabaugh v. Pitkin, 46 Ia., 544; Cromwell v. Hewitt, 40 N. Y., 491; 100 Am. Dec., 527; Douglass v. Reynolds, 7 Pet. 126; Wright v. Dyer, 48 Mo., 525.

when the surety is not. As, for instance, when the principal is (*a*) a married woman, (*b*) an infant, or (*c*) where the surety has actually signed and the signatures of the other parties have been forged.

2. But specially the surety may be discharged in the following ways: (*a*) by payment; (*b*) by alteration in a material part; (*c*) by release of the principal, unless there has been a reservation against the surety;¹ (*d*) misrepresentation on the part of the principal releases the surety as to all parties to such transaction;² (*e*) by satisfaction; (*f*) by creditors' parting with securities.³ (This discharge, however, is only *pro tanto*); (*g*) by diversion of the funds,⁴ (*h*) by entering into a binding agreement not to sue prior parties; (*i*) by a valid agreement for the extension of time by the principal obligee. It may be said, however, that a mere extension of time simply is no consideration.⁵ Neither will a part payment of the principal or interest be a good consideration for the extension of time. The extension of time which will release a surety must be upon a valid consideration and for a definite period. It has been held that a part payment of the principal in advance is a good consideration, as well as a payment of interest in advance. So also will an agreement to pay a larger rate of interest, in consideration of an extension of time, be a good consideration. A mere forbearance to sue simply is no consideration for the extension of time. If, however, the surety offers to indemnify the principal obligee against loss in case an action is brought against the principal debtor, then the principal obligee must bring an action, or otherwise the surety will be released.⁶

¹ 10 Pick., 528; 7 Wend., 429; 2 Cal., 121; 26 Kan., 573; 24 Mo. App., 317.

² 3 Ohio State, 302; 52 Iowa, 94.

³ 5 Pick., 507; 2 Neb., 265.

⁴ 1 Par. B. & N., 236.

⁵ 111 Pa. State, 187; 41 Ohio State, 603; 95 Ind., 156; 58 Mich., 343; 100 N. Y., 539.

⁶ 4 Johns. Chancery, 123.

Rights of Surety.—1. He may commence proceedings in chancery to compel creditors to sue the principal obligor.¹

2. He may go into chancery and compel the creditor to sue by indemnifying him.²

3. He may pay the debt himself and bring an action against the principal obligee.

4. If there are co-sureties, after he has paid the debt he may sue them for contribution.³

5. If he compromises with the creditor, he may recover that amount only of the debtor.⁴

6. If he pays the debt in a depreciated currency, he may recover its actual value only.⁵

¹ 17 Johns., 324.

² 6 Grat., 524.

³ Johnson v. Harvey, 84 N. Y., 363; 38 Am. Rep., 515; Voss v. Lewis, 126 Ind., 155; Houck v. Graham, 123 Ind., 277; Robertson v. Deatherage, 82 Ill., 511; Stump v. Richardson Co. Bk., 24 Neb., 522.

⁴ 22 Grat., 524.

⁵ 22 Grat., 753.

CHAPTER XXIV.

Guarantor, or Contract of Guaranty.

SECTION 64.

THE CONTRACT OF GUARANTY DIFFERS IN SOME IMPORTANT RESPECTS FROM THE CONTRACT OF SURETY, AND IT IS NOT EASY TO DEFINE IT IN ANY BRIEF AND COMPREHENSIVE FORMULA.

The Contract of Guaranty—Defined.—The contract of guaranty may be defined as *a collateral undertaking to answer for the debt, default or miscarriage of another*. It may be distinguished from the contract of surety in this, that it is secondary and collateral to the principal debt, while the contract of surety is primary and principal. In other words, a guarantor promises to pay the contract if the principal *cannot*, while a surety promises to pay the contract if the principal *does not*; *i. e.*, a guarantor insures the solvency of the debtor, while a surety insures the payment of the debt.

Form Required.—The contract of guaranty comes within the Statute of Frauds, and therefore must be in writing. No particular phraseology, however, is required.

Consideration for.—The contract of guaranty being a common law contract, it must be supported by a consideration. The consideration of the principal contract, however, is sufficient to support the contract of guaranty when they are executed and delivered at the same time and as a part of the same instrument.¹ If, however, the contract of guaranty is written upon a promissory note after the note has been delivered and taken effect as a contract, there must be a new and distinct consideration to support it.² A forbearance to sue is sufficient consideration to support the contract of guaranty.

¹Parkhurst v. Vail, 73 Ill., 343; 20 N. Y., 331.

²Rigby v. Norwood, 34 Ala., 129; 67 Mo., 667, 5 Cush., 80.

Negotiability of.—The contract of guaranty being a common law contract, it is not negotiable. But when it is connected with and made a part of a commercial contract, the weight of authority permits it to pass with the principal contract. Upon this question, however, there is much conflict in the authorities.¹

Grace.—The contract of guaranty being a common law contract standing alone, of course is not entitled to grace. But when the same is connected with a commercial contract it partakes of this characteristic, inasmuch as no liability can accrue against the guarantor until the principal debtor has become absolutely liable.

Kinds of Guarantees.—The kinds of guarantees may be enumerated as follows: They are general, special, conditional, absolute, limited, unlimited, temporary and continuing. The term used to designate the particular kind of a guaranty sufficiently explains its meaning.

Presentment, Demand, Notice of Dishonor—Necessity for.—It may be stated as a general rule that the undertaking of a guarantor is not conditional; it is absolute,—that the maker shall pay the note when due or he will; and to render him liable no demand is necessary. But if the contract of guaranty depends upon a contingency, then a demand and notice must be given within a reasonable time. It will be noticed here, however, that the strict rule of presentment, demand and notice of dishonor does not apply to the contract of guaranty even in this case.² When the terms of the contract are absolute, the courts do not agree as to the necessity of presentment, demand and notice of dishonor. For the cases holding that no demand is necessary, see 20 Johns., 366; 19 Ohio State, 553; 40 Ill., 159. Holding that demand, etc., is necessary, see 7 Peters, 126; 12 Peters, 523.

It may be said that even where presentment and demand and notice of dishonor are required, it is sufficient if they are made and done in a reasonable time. And even if omitted

¹See in favor of the proposition, Story on Bills, § 458, and contra, Parsons on B. & N., 133.

²See 12 Peters, 207; 45 Ohio State, 388; 39 Ill., 577; 19 Ohio State, 453.

altogether, the guarantor is not released unless he has suffered some loss, and then only *pro tanto*.¹ If the principal debtor is insolvent at the time of the maturity of the contract and so continues, the guarantor cannot complain of a failure or delay to make demand.²

Liability of a Guarantor.—At common law he was not liable until it was shown that the principal debtor could not pay the debt, *i. e.*, a judgment and execution had to precede an action against the guarantor. But now by statute in many of the states this common law rule has been changed so that a guarantor may be sued with the principal and at the same time. He is liable for the full amount of the contract.

Liabilities of Guarantor—How Discharged.—It may be stated generally that whatever discharges the principal discharges the guarantor. The guarantor may also be discharged by payment, by extension of time by the creditor (if upon sufficient consideration), by surrender of any security held by the creditor, and by a forbearance to sue the principal within a reasonable time.

Rights of Guarantor.—1. When he pays the debt, he is subrogated to all the rights of the original creditor.

2. When he pays the debt, he should insist upon keeping the note alive, *i. e.*, he should not allow the note to be cancelled.

3. If, however, the note is cancelled, he may still sue for money paid for the use of the debtor.

¹ 2 Mich., 504; 39 Ill., 577; 40 Ill., 155.

² 12 Peters, 525.

THE AMERICAN UNIFORM NEGOTIABLE INSTRUMENTS LAW.¹

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¹It has been adopted in the following States of the United States:

1. Colorado, Laws of 1897, Chapter 239;
2. Connecticut, Laws of 1897, Chapter 74;
3. Florida, Laws of 1867, Chapter 4524;
4. Maryland, Laws of 1897;
5. New York, Laws of 1897, Chapter 612;
6. The District of Columbia, 1897.

The chapters following are articles of the New York Negotiable Instruments Law. They constitute Chapter 50 of the general laws of New York. It became a law May 19, 1897, and went into effect Oct. 1 of the same year. This act was recommended by the Commissioners on the Uniformity of Laws. The following states, *Colorado, Connecticut, Florida, Maryland, Virginia* and the *District of Columbia* have each enacted the same recommendation into law. The acts of the different states are identical except as to headings and sections. It is expected that this uniform law will ultimately be adopted in all the states. It has been recommended for adoption in Rhode Island, Massachusetts and South Carolina. The chapters and sections in brackets are those corresponding to the New York law.

- Chapter 36 [XII] Presentment for Acceptance. (§§ 240–248.)
- “ 37 [XIII] Protest. (§§ 250–268.)
- “ 38 [XIV] Acceptance for Honor. (§§ 280–290.)
- “ 39 [XV] Payment for Honor. (§§ 300–306.)
- “ 40 [XVI] Bills in a Set. (§§ 310–315.)
- “ 41 [XVII] Promissory Notes and Checks. (§§ 320–325.)
- “ 42 [XVIII] Notes Given for a Patent Right and for a Speculative Consideration. (§§ 330–332.)
- “ 43 [XIX] Laws Repealed, When to Take Effect. (§§ 340–341.)

CHAPTER XXV.

General Provisions.

SECTION 65.

SHORT TITLE.

[1.] This act shall be known as the negotiable instruments law.

SECTION 66.

DEFINITIONS AND MEANING OF TERMS.

[2.] In this act, unless the context otherwise requires:

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means negotiable promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Instrument” means negotiable instrument.

“Issue” means the first delivery of the instrument, complete in form to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

SECTION 67.

PERSON PRIMARILY LIABLE ON INSTRUMENT.

[3.] The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are “secondarily” liable.

SECTION 68.

REASONABLE TIME, WHAT CONSTITUTES.

[4.] In determining what is a “reasonable time” or an “unreasonable time” regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

SECTION 69.

TIME, HOW COMPUTED: WHEN LAST DAY FALLS ON HOLIDAY.

[5.] Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

SECTION 70.

APPLICATION OF CHAPTER.

[6.] The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

SECTION 71.

LAW MERCHANT; WHEN GOVERNS.

[7.] In any case not provided for in this act the rules of the law merchant shall govern.

CHAPTER XXVI.

Form and Interpretation.

SECTION 72.

FORM OF NEGOTIABLE INSTRUMENT.

[20.] An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
 2. Must contain an unconditional promise or order to pay a sum certain in money;
 3. Must be payable on demand, or at a fixed or determinable future time;
 4. Must be payable to order or to bearer; and
 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.
-

SECTION 73.

CERTAINTY AS TO SUM; WHAT CONSTITUTES.¹

[21.] The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or

¹The foregoing section, with the exception of the last subdivision, is taken from the English Bills of Exchange Act, Sec. 9, subd. 1.

4. With exchange, whether at a fixed rate or at the current rate, or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

SECTION 74.

WHEN PROMISE IS UNCONDITIONAL.¹

[22.] An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

SECTION 75.

DETERMINABLE FUTURE TIME; WHAT CONSTITUTES.²

[23.] An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

¹This section is taken from the English Bills of Exchange Act, Sec. 3, Subd. 3.

²This section is substantially Section 11 of the English Bills of Exchange Act, with the exception of subd. 2, which is added.

SECTION 76.

ADDITIONAL PROVISIONS NOT AFFECTING NEGOTIABILITY.

[24.] An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

SECTION 77.

OMISSIONS; SEAL; PARTICULAR MONEY.¹

[25.] The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

¹ The first three subdivisions are from the English Bills of Exchange Act, Sec. 3.

SECTION 78.

WHEN PAYABLE ON DEMAND.

[26.] An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

SECTION 79.

WHEN PAYABLE TO ORDER.

[27.] The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawee¹ or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of the several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

SECTION 80.

WHEN PAYABLE TO BEARER.²

[28.] The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or

¹ Probably intended for *drawer*.

² This section is, in substance, Section 8 of the English Bills of Exchange Act.

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank.¹

SECTION 81.

TERMS WHEN SUFFICIENT.

[29.] The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

SECTION 82.

DATE PRESUMPTION AS TO.

[30.] Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the date of the making, drawing, acceptance or indorsement, as the case may be.

SECTION 83.

ANTE-DATED AND POST-DATED.²

[31.] The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

¹ *Armstrong v. Pomeroy*, Nat. Bk., 46 Ohio St., 512; *Bennett v. Farwell*, 1 Campb., 130.

² This is Sec. 13, subd. 1, of the English Bills of Exchange Act, in substance.

SECTION 84.

WHEN DATE MAY BE INSERTED.¹

[32.] Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

SECTION 85.

BLANKS; WHEN MAY BE FILLED.²

[33.] Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

¹ This is, in substance, Section 12 of the English Bills of Exchange Act.

² This is taken from Section 20 of the English Bills of Exchange Act.

SECTION 86.**INCOMPLETE INSTRUMENT NOT DELIVERED.**

[34.] Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

SECTION 87.**DELIVERY; WHEN EFFECTUAL; WHEN PRESUMED.**

[35.] Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

SECTION 88.**CONSTRUCTION WHERE INSTRUMENT IS AMBIGUOUS.¹**

[36.] Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

¹ Subd. 1. The first clause in this subdivision is taken from the English Bills of Exchange Act, sec. 9, subd. 2.

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. When there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

SECTION 89.

LIABILITY OF PERSONS SIGNING IN TRADE OR ASSUMED NAME.

[37.] No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

SECTION 90.

SIGNATURE BY AGENT; AUTHORITY HOW SHOWN.

[38.] The signature of any party may be made by a duly authorized agent. No particular form of appointment is

necessary for this purpose; and the authority of the agent may be established as in other cases of agency.¹

SECTION 91.

LIABILITY OF PERSON SIGNING AS AGENT, ETC.

[39.] Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

SECTION 92.

SIGNATURE BY PROCURATION; EFFECT OF.²

[40.] A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

SECTION 93.

EFFECT OF INDORSEMENT BY INFANT OR CORPORATION.³

[41.] The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

¹Allen v. Williams, 97 Cal., 403.

²English Bills of Exchange Act, sec. 25.

³This section is taken from the English Bills of Exchange Act, sec. 22, subd. 2.

SECTION 94.

FORGED SIGNATURES; EFFECT OF.¹

[42.] Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

¹ See sec. 24 of the English Bills of Exchange Act.

CHAPTER XXVII.

Consideration of Negotiable Instruments

SECTION 95.

PRESUMPTION OF CONSIDERATION.

[50.] Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

SECTION 96.

CONSIDERATION, WHAT CONSTITUTES.

[51.] Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

SECTION 97.

WHAT CONSTITUTES HOLDER FOR VALUE.¹

[52.] Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

¹ This section is taken from the English Bills of Exchange Act, sec. 27, subd. 2, and is founded upon *Hunter v. Wilson*, 4 Ex., 489. See Daniel, sec. 174a.

SECTION 98.

WHEN LIEN ON INSTRUMENTS CONSTITUTES HOLDER
FOR VALUE.¹

[53.] Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

SECTION 99.

EFFECT OF WANT OF CONSIDERATION.

[54.] Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise.

SECTION 100.

LIABILITY OF ACCOMMODATION INDORSER.²

[55.] An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

¹ This section is taken from the English Bills of Exchange Act, sec. 27, subd. 3, and is founded upon *Collins v. Martin*, 1 Bos. & P., 648.

² This is taken from sec. 28, of the English Bills of Exchange Act.

CHAPTER XXVIII.

Negotiation.

SECTION 101.

WHAT CONSTITUTES NEGOTIATION.

[60.] An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiable by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

SECTION 102.

INDORSEMENT; HOW MADE.

[61.] The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.¹

SECTION 103.

INDORSEMENT MUST BE OF ENTIRE INSTRUMENT.

[62.] The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

¹ Brown v. Butchers and Drovers Bank, 6 Hill, 443; 41 Am. Dec. 755; Johnson Ill. Cases, 114.

SECTION 104.**KINDS OF INDORSEMENT.**

[63.] An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

SECTION 105.**SPECIAL INDORSEMENT; INDORSEMENT IN BLANK.**

[64.] A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

SECTION 106.**BLANK INDORSEMENT; HOW CHANGED TO SPECIAL INDORSEMENT.**

[65.] The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

SECTION 107.**WHEN INDORSEMENT RESTRICTIVE.**

[66.] An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

SECTION 108.**EFFECT OF RESTRICTIVE INDORSEMENT; RIGHTS OF INDORSEE.**

[67.] A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

SECTION 109.**QUALIFIED INDORSEMENT.**

[68.] Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

SECTION 110.**CONDITIONAL INDORSEMENT.**

[69.] Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

SECTION 111.

INDORSEMENT OF INSTRUMENT PAYABLE TO BEARER.

[70.] Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

SECTION 112.

INDORSEMENT WHERE PAYABLE TO TWO OR MORE PERSONS.

[71.] Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

SECTION 113.

EFFECT OF INSTRUMENT DRAWN OR INDORSED TO A PERSON AS CASHIER.

[72.] Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

SECTION 114.

INDORSEMENT WHERE NAME IS MISSPELLED, ET CETERA.

[73.] Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

SECTION 115.

INDORSEMENT IN REPRESENTATIVE CAPACITY.

[74.] Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

SECTION 116.

TIME OF INDORSEMENT; PRESUMPTION.

[75.] Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

SECTION 117.

PLACE OF INDORSEMENT; PRESUMPTION.

[76.] Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

SECTION 118.

CONTINUATION OF NEGOTIABLE CHARACTER.

[77.] An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

SECTION 119.

STRIKING OUT INDORSEMENT.

[78.] The holder may at any time strike out any indorsement which is not necessary to his title. The indorser

whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

SECTION 120.

TRANSFER WITHOUT INDORSEMENT; EFFECT OF.

[79.] Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

SECTION 121.

WHEN PRIOR PARTY MAY NEGOTIATE INSTRUMENT.

[80.] Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

CHAPTER XXIX.

Rights of Holders.

SECTION 122.

RIGHT OF HOLDER TO SUE; PAYMENT

[90.] The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

SECTION 123.

WHAT CONSTITUTES A HOLDER IN DUE COURSE.¹

[91.] A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
 3. That he took it in good faith and for value;
 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.
-

SECTION 124.

WHEN PERSON NOT DEEMED HOLDER IN DUE COURSE.

[92.] Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

¹This section is taken from the English Bills of Exchange Act, sec. 29.

SECTION 125.**NOTICE BEFORE FULL AMOUNT PAID.**

[93.] Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

SECTION 126.**WHEN TITLE DEFECTIVE.**

[94.] The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amounts to a fraud.

SECTION 127.**WHAT CONSTITUTES NOTICE OF DEFECT.**

[95.] To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

SECTION 128.**RIGHTS OF HOLDER IN DUE COURSE.**

[96.] A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce

payment of the instrument for the full amount thereof against all parties liable thereon.

SECTION 129.

WHEN SUBJECT TO ORIGINAL DEFENSES.

[97.] In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

SECTION 130.

WHO DEEMED HOLDER IN DUE COURSE.

[98.] Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

CHAPTER XXX.

Liabilities of Parties.

SECTION 131.

LIABILITY OF MAKER.

[110.] The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

SECTION 132.

LIABILITY OF DRAWER.

[111.] The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

SECTION 133.

LIABILITY OF ACCEPTOR.

[112.] The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

SECTION 134.**WHEN PERSON DEEMED INDORSER.**

[113.] A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

SECTION 135.**LIABILITY OF IRREGULAR INDORSER.**

[114.] Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties;
 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer;
 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.
-

SECTION 136.**WARRANTY WHERE NEGOTIATION BY DELIVERY,
ET CETERA.**

[115.] Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

SECTION 137.

LIABILITY OF GENERAL INDORSER.

[116.] Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and,
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

SECTION 138.

LIABILITY OF INDORSER WHERE PAPER NEGOTIABLE BY DELIVERY.

[117.] Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

SECTION 139.

ORDER IN WHICH INDORSERS ARE LIABLE.

[118.] As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

SECTION 140.

LIABILITY OF AGENT OR BROKER.

[119.] Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by Section 115¹ of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

¹ This is Sec. 65 in the other states.

CHAPTER XXXI.

Presentment for Payment.¹

SECTION 141.

EFFECT OF WANT OF DEMAND ON PRINCIPAL DEBTOR.

[130.] Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

SECTION 142.

PRESENTMENT WHERE INSTRUMENT IS NOT PAYABLE ON DEMAND.

[131.] Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

SECTION 143.

WHAT CONSTITUTES A SUFFICIENT PRESENTMENT.

[132.] Presentment for payment, to be sufficient, must be made:

¹ This article is taken largely from the English Act and is generally declaratory of the law.

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

SECTION 144.

PLACE OF PRESENTMENT.

[133.] Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

SECTION 145.

INSTRUMENT MUST BE EXHIBITED.

[134.] The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

SECTION 146.

PRESENTMENT WHERE INSTRUMENT PAYABLE AT BANK.

[135.] When the instrument is payable at a bank, presentment must be made during banking hours, unless the per-

son to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

SECTION 147.

PRESENTMENT WHERE PRINCIPAL DEBTOR IS DEAD.

[136.] Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

SECTION 148.

PRESENTMENT TO PERSONS LIABLE AS PARTNERS.

[137.] Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

SECTION 149.

PRESENTMENT TO JOINT DEBTORS.

[138.] Where there are several persons not partners primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

SECTION 150.

WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE DRAWER.

[139.] Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

SECTION 151.**WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE INDORSER.**

[140.] Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

SECTION 152.**WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.**

[141.] Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

SECTION 153.**WHEN PRESENTMENT MAY BE DISPENSED WITH.**

[142.] Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
 2. Where the drawee is a fictitious person;
 3. By waiver of presentment expressed or implied.
-

SECTION 154.**WHEN INSTRUMENT DISHONORED BY NON-PAYMENT.**

[143.] The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

SECTION 155.

LIABILITY OF PERSON SECONDARILY LIABLE, WHEN INSTRUMENT DISHONORED.

[144.] Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

SECTION 156.

TIME OF MATURITY.

[145.] Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

SECTION 157.

TIME; HOW COMPUTED.

[146.] Where the interest is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

SECTION 158.

RULE WHERE INSTRUMENT PAYABLE AT BANK.

[147.] Where the instrument is made payable at a bank

it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

SECTION 159.

WHAT CONSTITUTES PAYMENT IN DUE COURSE.

[148.] Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

CHAPTER XXXII.

Notice of Dishonor.

SECTION 160.

TO WHOM NOTICE OF DISHONOR MUST BE GIVEN.

[160.] Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

SECTION 161.

BY WHOM GIVEN.

[161.] The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.

SECTION 162.

NOTICE GIVEN BY AGENT.

[162.] Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

SECTION 163.

EFFECT OF NOTICE GIVEN ON BEHALF OF HOLDER.

[163.] Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and

all prior parties who have a right of recourse against the party to whom it is given.

SECTION 164.

EFFECT WHERE NOTICE IS GIVEN BY PARTY ENTITLED THERETO.

[164.] Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

SECTION 165.

WHEN AGENT MAY GIVE NOTICE.

[165.] Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

SECTION 166.

WHEN NOTICE SUFFICIENT.

[166.] A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

SECTION 167.

FORM OF NOTICE.

[167.] The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the

instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

SECTION 168.

TO WHOM NOTICE MAY BE GIVEN.

[168.] Notice of dishonor may be given either to the party himself or to his agent in that behalf.

SECTION 169.

NOTICE WHERE PARTY IS DEAD.

[169.] When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if, with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

SECTION 170.

NOTICE TO PARTNERS.

[170.] Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

SECTION 171.

NOTICE TO PERSONS JOINTLY LIABLE.

[171.] Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

SECTION 172.**NOTICE TO BANKRUPT.**

[172.] Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

SECTION 173.**TIME WITHIN WHICH NOTICE MUST BE GIVEN.**

[173.] Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

SECTION 174.**WHERE PARTIES RESIDE IN SAME PLACE.**

[174.] Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
 2. If given at his residence, it must be given before the usual hours of rest on the day following;
 3. If sent by mail, it must be deposited in the postoffice in time to reach him in usual course on the day following.
-

SECTION 175.**WHERE PARTIES RESIDE IN DIFFERENT PLACES.**

[175.] Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.

SECTION 176.

WHEN SENDER DEEMED TO HAVE GIVEN DUE NOTICE.

[176.] Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

SECTION 177.

DEPOSIT IN POSTOFFICE; WHAT CONSTITUTES.

[177.] Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department.

SECTION 178.

NOTICE TO SUBSEQUENT PARTY; TIME OF.

[178.] Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

SECTION 179.

WHERE NOTICE MUST BE SENT.

[179.] Where a party has added an address to his signature, notice of dishonor must be sent to that address; but

if he has not given such address, then the note must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

SECTION 180.

WAIVER OF NOTICE.

[180] Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

SECTION 181.

WHOM AFFECTED BY WAIVER.

[181.] Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

SECTION 182.

WAIVER OF PROTEST.

[182]. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

SECTION 183.**WHEN NOTICE IS DISPENSED WITH.**

[183]. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

SECTION 184.**DELAY IN GIVING NOTICE; HOW EXCUSED.**

[184]. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

SECTION 185.**WHEN NOTICE NEED NOT BE GIVEN TO DRAWER.**

[185]. Notice of honor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
 2. Where the drawee is a fictitious person or a person not having capacity to contract;
 3. Where the drawer is the person to whom the instrument is presented for payment;
 4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
 5. Where the drawer has countermanded payment;
-

SECTION 186.**WHEN NOTICE NEED NOT BE GIVEN TO INDORSER.**

[186]. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

SECTION 187.

NOTICE OF NON-PAYMENT WHERE ACCEPTANCE REFUSED.

[187]. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

SECTION 188.

EFFECT OF OMMISSION TO GIVE NOTICE OF NON- ACCEPTANCE.

[188]. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

SECTION 189.

WHEN PROTEST NEED NOT BE MADE; WHEN MUST BE MADE.

[189]. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

CHAPTER XXXIII.

Discharge of Negotiable Instruments.

SECTION 190.

INSTRUMENT; HOW DISCHARGED.

[200]. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
 2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
 3. By the intentional cancellation thereof by the holder;
 4. By any other act which will discharge a simple contract for the payment of money.
 5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.
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SECTION 191.

WHEN PERSONS SECONDARILY LIABLE ON, DISCHARGED.

[201.] A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to en-

force the instrument, unless the right of recourse against such party is expressly reserved.

SECTION 192.

RIGHT OF PARTY WHO DISCHARGES INSTRUMENT.

[202.] Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

SECTION 193.

RENUNCIATION BY HOLDER.

[203.] The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

SECTION 194.

CANCELLATION; UNINTENTIONAL; BURDEN OF PROOF.

[204.] A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who

alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

SECTION 195.

ALTERATION OF INSTRUMENT; EFFECT OF.

[205.] Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

SECTION 196.

WHAT CONSTITUTES A MATERIAL ALTERATION.

[206.] Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

CHAPTER XXXIV.

Bills of Exchange; Form and Interpretation.

SECTION 197.

BILL OF EXCHANGE DEFINED.

[210.] A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determinable future time a sum certain in money to order or to bearer.

SECTION 198.

BILL NOT AN ASSIGNMENT OF FUNDS IN HANDS OF DRAWEE.

[211.] A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

SECTION 199.

BILL ADDRESSED TO MORE THAN ONE DRAWEE.

[212.] A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

SECTION 200.

INLAND AND FOREIGN BILLS OF EXCHANGE.¹

[213.] An inland bill of exchange is a bill which is, or

¹ See English Bills of Exchange Act, Sec. 4; Commercial Bk. v. Varnum, 49 N. Y., 269.

on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

SECTION 201.

WHEN BILL MAY BE TREATED AS PROMISSORY NOTE.¹

[214.] Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

SECTION 202.

DRAWEE IN CASE OF NEED.²

[215.] The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

¹ See English Bills of Exchange Act, Sec. 5 (2); *Miller v. Thompson*, 3 M. & Gr., 576; *Smith v. Bellamy*, 2 Stark., 223; *Daniel*, Sec. 131.

² See English Bills of Exchange Act, Sec. 15.

CHAPTER XXXV.
Acceptance of Bills of Exchange.

SECTION 203.

ACCEPTANCE; HOW MADE, ET CETERA.

[220.] The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawer. It must not express that the drawee will perform his promise by any other means than the payment of money.

SECTION 204.

HOLDER ENTITLED TO ACCEPTANCE ON FACE OF BILL.

[221.] The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and if such request is refused, may treat the bill as dishonored.

SECTION 205.

ACCEPTANCE BY SEPARATE INSTRUMENT.

[222.] Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

SECTION 206.

**PROMISE TO ACCEPT; WHEN EQUIVALENT TO
ACCEPTANCE**

[223.] An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor

of every person who, upon the faith thereof, receives the bill for value.

SECTION 207.

TIME ALLOWED DRAWEE TO ACCEPT.

[224.] The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

SECTION 208.

LIABILITY OF DRAWEE RETAINING OR DESTROYING BILL.¹

[225.] Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

SECTION 209.

ACCEPTANCE OF INCOMPLETE BILL.²

[226.] A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

¹Matteson v. Moulton, 11 Hun., 268; Gates v. Erie, 4 Hun., 96.

²See English Bills of Exchange Act, Sec. 18.

SECTION 210.

KINDS OF ACCEPTANCES.¹

[227.] An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

SECTION 211.

WHAT CONSTITUTES A GENERAL ACCEPTANCE.²

[228.] An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

SECTION 212.

QUALIFIED ACCEPTANCE.

[229.] An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
 2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
 3. Local, that is to say, an acceptance to pay part only at a particular place;
 4. Qualified as to time;
 5. The acceptance of some one or more of the drawees, but not of all.
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SECTION 213.

RIGHTS OF PARTIES AS TO QUALIFIED ACCEPTANCE.

[230.] The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he

¹ See English Bills of Exchange Act, Sec. 19.

² See English Bills of Exchange Act, Sec. 19 (2 c).

may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

CHAPTER XXXVI.

Presentment of Bills of Exchange for Acceptance.

SECTION 214.

WHEN PRESENTMENT FOR ACCEPTANCE MUST BE MADE

[240.] Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

SECTION 215.

WHEN FAILURE TO PRESENT RELEASES DRAWER AND INDORSER.

[241.] Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and also indorsers are discharged.

SECTION 216.

PRESENTMENT; HOW MADE.

[242.] Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business

day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

SECTION 217.

ON WHAT DAYS PRESENTMENT MAY BE MADE.

[243.] A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

SECTION 218.

PRESENTMENT WHERE TIME IS INSUFFICIENT.

[244.] Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

SECTION 219.

WHERE PRESENTMENT IS EXCUSED.

[245.] Presentment for acceptance is excused and a bill

may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill;
2. Where, after the exercise of reasonable diligence, presentment cannot be made;
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

SECTION 220.

WHEN DISONORED BY NON-ACCEPTANCE.

[246.] A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

SECTION 221.

DUTY OF HOLDER WHERE BILL NOT ACCEPTED.

[247.] Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

SECTION 222.

RIGHTS OF HOLDER WHERE BILL NOT ACCEPTED.

[248.] When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

CHAPTER XXXVII.

Protest of Bills of Exchange.

SECTION 223.

IN WHAT CASES PROTEST NECESSARY.

[260.] Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawers and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

SECTION 224.

PROTEST; HOW MADE.

[261.] The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
 2. The fact that presentment was made and the manner thereof;
 3. The cause or reason for protesting the bill;
 4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.
-

SECTION 225.

PROTEST; BY WHOM MADE.

[262.] Protest may be made by:

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

SECTION 226.

PROTEST; WHEN TO BE MADE.

[263.] When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

SECTION 227.

PROTEST; WHERE MADE.

[264.] A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

SECTION 228.

PROTEST BOTH FOR NON-ACCEPTANCE AND NON-PAYMENT.

[265.] A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

SECTION 229.

PROTEST BEFORE MATURITY WHERE ACCEPTOR INSOLVENT.

[266.] Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit

of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

SECTION 230.

WHEN PROTEST DISPENSED WITH.¹

[267.] Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

SECTION 231.

PROTEST WHERE BILL IS LOST, ETC.²

[268.] Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

¹ This is taken from the English Bills of Exchange Act, sec. 51, subd. 9; *Morgan v. Bank, etc.*, 4 Bush, (Ky.), 82; *Daniel on Neg. Inst.*, sec. 730.

² This is quoted directly from the English Bills of Exchange Act, sec. 51, subd. 8.

CHAPTER XXXVIII.

Acceptance of Bills of Exchange for Honor.

SECTION 232.

WHEN BILLS MAY BE ACCEPTED FOR HONOR.

[280.] Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

SECTION 233.

ACCEPTANCE FOR HONOR; HOW MADE.

[281.] An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

SECTION 234.

WHEN DEEMED TO BE AN ACCEPTANCE FOR HONOR OF THE DRAWER.

[282.] When an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

SECTION 235.

LIABILITY OF ACCEPTOR FOR HONOR.

[283.] The acceptor for honor is liable to the holder and all parties to the bill subsequent to the party for whose honor he has accepted.

SECTION 236.

AGREEMENT OF ACCEPTOR FOR HONOR.

[284.] The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

SECTION 237.

MATURITY OF BILL PAYABLE AFTER SIGHT; ACCEPTED FOR HONOR.

[285.] Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

SECTION 238.

PROTEST OF BILL ACCEPTED FOR HONOR, ET CETERA.

[286.] Where a dishonored bill has been accepted for honor *snpra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

SECTION 239.

**PRESENTMENT FOR PAYMENT TO ACCEPTOR FOR HONOR;
HOW MADE.**

[287.] Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.¹

SECTION 240.**WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.**

[288.] The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.²

SECTION 241.**DISHONOR OF BILL BY ACCEPTOR FOR HONOR.**

[289.] When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

¹So in original. There is no section 104, probably means sec. 175.

²So in original. Probably means sec. 141.

CHAPTER XXXIX.

Payment of Bills of Exchange for Honor.

SECTION 242.

WHO MAY MAKE PAYMENT FOR HONOR.

[300.] Where a bill has been protested for non-payment any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

SECTION 243.

PAYMENT FOR HONOR; HOW MADE.

[301.] The payment for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

SECTION 244.

DECLARATION BEFORE PAYMENT FOR HONOR.

[302.] The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

SECTION 245.

PREFERENCE OF PARTIES OFFERING TO PAY FOR HONOR.

[303.] Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will

discharge most parties to the bill is to be given the preference.

SECTION 246.

EFFECT ON SUBSEQUENT PARTIES WHERE BILL IS PAID FOR HONOR.

[304.] Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

SECTION 247.

WHERE HOLDER REFUSES TO RECEIVE PAYMENT SUPRA PROTEST.

[305.] Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

SECTION 248.

RIGHTS OF PAYER FOR HONOR.

[306.] The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

CHAPTER XL.

Bills in a Set.

SECTION 249.

BILLS IN SETS CONSTITUTE ONE BILL.

[310.] Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

SECTION 250.

RIGHTS OF HOLDERS WHERE DIFFERENT PARTS ARE NEGOTIATED.

[311.] Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

SECTION 251.

LIABILITY OF HOLDER WHO INDORSES TWO OR MORE PARTS OF A SET TO DIFFERENT PERSONS.

[312.] Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

SECTION 252.

ACCEPTANCE OF BILLS DRAWN IN SETS.

[313.] The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

SECTION 253.

PAYMENT BY ACCEPTOR OF BILLS DRAWN IN SETS.

[314.] When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

SECTION 254.

EFFECT OF DISCHARGING ONE OF A SET.

[315.] Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

CHAPTER XLI.

Promissory Notes and Checks.

SECTION 255.

PROMISSORY NOTE DEFINED.

[320.] A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

SECTION 256.

CHECK DEFINED.

[321.] A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

SECTION 257.

WITHIN WHAT TIME A CHECK MUST BE PRESENTED.

[322.] A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.¹

¹ See *Culver v. Marks*, 122 Ind., 554; 22 N. E. Rep., 1086.

SECTION 258.

CERTIFICATION OF CHECK: EFFECT OF.

[323.] Where a check is certified by the bank on which it is drawn the certificate is equivalent to an acceptance.

SECTION 259.

EFFECT WHERE THE HOLDER OF CHECK PROCURES IT
TO BE CERTIFIED.

[324.] Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.¹

SECTION 260.

WHEN CHECK OPERATES AS AN ASSIGNMENT.

[325.] A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

¹ Minot v. Russ, 156 Mass., 458.

CHAPTER XLII.

Notes Given for a Patent Rights and for a Speculative Consideration.

SECTION 261.

NEGOTIABLE INSTRUMENT GIVEN FOR PATENT RIGHTS.

[330.] A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

SECTION 262.

NEGOTIABLE INSTRUMENT FOR A SPECULATIVE CONSIDERATION.

[331.] If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase-price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at

the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

SECTION 263.

HOW NEGOTIABLE BONDS ARE MADE NON-NEGOTIABLE.

[332.] The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon, that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

CHAPTER XLIII.

Laws Repealed; When to Take Effect.

SECTION 264.

LAW REPEALED.

[340.] The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

SECTION 265.

WHEN TO TAKE EFFECT.

[341.] This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven.

ENGLISH BILLS OF EXCHANGE ACT, 1882.

(45 AND 46 VICT., CH. 61, AUG. 18, 1882.)

**An Act to Codify the Law Relating to Bills of Exchange,
Cheques, and Promissory Notes.**

CHAPTER XLIV.

Preliminary.

SECTION 266.

SHORT TITLE.

[1.] This act may be cited as the Bills of Exchange Act, 1882.

SECTION 267.

INTERPRETATION OF TERMS.

[2.] In this act, unless the context otherwise requires:—

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Banker” includes a body of persons, whether incorporated or not, who carry on the business of banking.

“Bankrupt” includes any person whose estate is vested in a trustee or assignee, under the law for the time being in force relating to bankruptcy.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

“Bill” means bill of exchange, and “note” means promissory note.

“Delivery” means transfer of possession, actual or constructive, from one person to another.

“Holder” means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.

“Indorsement” means an indorsement completed by delivery.

“Issue” means the first delivery of a bill or note, completed in form, to a person who takes it as a holder.

“Person” includes a body of persons, whether incorporated or not.

“Value” means valuable consideration.

“Written” includes printed, and “writing” includes print.

CHAPTER XLV.

Bills of Exchange—Form and Interpretation.

SECTION 268.

BILL OF EXCHANGE DEFINED.

[3.] 1. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

2. An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

4. A bill is not invalid by reason—

(a) That it is not dated;

(b) That it does not specify the value given, or that any value has been given therefor;

(c) That it does not specify the place where it is drawn or the place where it is payable.

SECTION 269.

INLAND AND FOREIGN BILLS.

[4.] 1. An inland bill is a bill which is, or on the face of it purports to be—(a) both drawn and payable within the

British Islands, or (*b*) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this act “British Islands” mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

2. Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

SECTION 270.

EFFECT WHERE DIFFERENT PARTIES TO BILL ARE THE SAME PERSON.

[5.] 1. A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

2. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

SECTION 271.

ADDRESS TO DRAWEE.

[6.] 1. The drawee must be named or otherwise indicated in a bill with reasonable certainty.

2. A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative, or two or more drawees in succession, is not a bill of exchange.

SECTION 272.

CERTAINTY REQUIRED AS TO PAYEE.

[7.] 1. Where a bill is not payable to bearer, the

payee must be named or otherwise indicated therein with reasonable certainty.

2. A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

3. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

SECTION 273.

WHAT BILLS ARE NEGOTIABLE.

[8.] 1. When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

2. A negotiable bill may be payable either to order or to bearer.

3. A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

4. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

5. Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

SECTION 274.

SUMS PAYABLE.

[9.] 1. The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

(a) With interest.

(b) By stated installments.

(c) By stated installments, with a provision that upon default in payment of any installment the whole shall become due.

(d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill.

2. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

3. Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

SECTION 275.

BILL PAYABLE ON DEMAND.

[10.] 1. A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

2. Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

SECTION 276.

BILL PAYABLE AT A FUTURE TIME.

[11.] A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—

1. At a fixed period after date or sight.

2. On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

SECTION 277.

OMISSION OF DATE IN BILL PAYABLE AFTER DATE.

[12.] Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

SECTION 278.

ANTE-DATING AND POST-DATING.

[13.] 1. Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance or indorsement, as the case may be.

2. A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

SECTION 279.

COMPUTATION OF TIME OF PAYMENT.

[14.] Where a bill is not payable on demand, the day on which it falls due is determined as follows:

1. Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace:

Provided that—

- (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;
- (b) When the last day of grace is a bank holiday (other than Christmas day or Good Friday) under the Bank Holidays Act, 1871,¹ and acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

2. Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

3. Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for non-delivery.

4. The term "month" in a bill mean calendar month.

SECTION 280.

CASE OF NEED.

[15.] The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

¹ 34 and 35 Vict., Ch. 17.

SECTION 281.

OPTIONAL STIPULATIONS BY DRAWER OR INDORSER.

[16.] The drawer of a bill, and any indorser, may insert therein an express stipulation:—

1. Negating or limiting his own liability to the holder;
 2. Waiving as regards himself some or all of the holder's duties.
-

SECTION 282.

DEFINITION AND REQUISITES OF ACCEPTANCE.

[17.] 1. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

2. An acceptance is invalid unless it complies with the following conditions, namely:

- (a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.
 - (b) It must not express that the drawee will perform his promise by any other means than the payment of money.
-

SECTION 283.

TIME FOR ACCEPTANCE.

[18.] A bill may be accepted:—

1. Before it has been signed by the drawer, or while otherwise incomplete;
2. When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment;
3. When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

SECTION 284.

GENERAL AND QUALIFIED ACCEPTANCES.

[19.] 1. An acceptance is either (*a*) general or (*b*) qualified.

2. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is:—

- (*a*) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
- (*b*) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
- (*c*) Local, that is to say, an acceptance to pay only at a particular specified place;

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere;

- (*d*) Qualified as to time;
- (*e*) The acceptance of some one or more of the drawees, but not of all.

SECTION 285.

INCHOATE INSTRUMENTS.

[20.] 1. Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

2. In order that any such instrument when completed may be enforceable against any person who became a party

thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given.

Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

SECTION 286.

DELIVERY.

[21.] 1. Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

2. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery:—

(a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be;

(b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

3. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

CHAPTER XLVI.

Capacity and Authority of Parties.

SECTION 287.

CAPACITY OF PARTIES.

[22.] 1. Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

2. Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

SECTION 288.

SIGNATURE ESSENTIAL TO LIABILITY.

[23.] No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such:

Provided that—

1. Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name;

2. The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

SECTION 289.

FORGED OR UNAUTHORIZED SIGNATURE.

[24.] Subject to the provisions of this Act, where a sig-

nature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

SECTION 290.

PROCURATION SIGNATURES.

[25.] A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

SECTION 291.

PERSONS SIGNING AS AGENT OR IN REPRESENTATIVE CAPACITY.

[26.] 1. Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

2. In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

CHAPTER XLVII.

The Consideration for a Bill.

SECTION 292.

VALUE AND HOLDER FOR VALUE.

[27.] 1. Valuable consideration for a bill may be constituted by:—

- (a) Any consideration sufficient to support a simple contract;
- (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

2. Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

3. Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

SECTION 293.

ACCOMMODATION BILL OR PARTY.

[28.] 1. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value thereof, and for the purpose of lending his name to some other person.

2. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

SECTION 294.

HOLDER IN DUE COURSE.

[29.] 1. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:

- (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
- (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

2. In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

3. A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

SECTION 295.

PRESUMPTION OF VALUE AND GOOD FAITH.

[30.] 1. Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

2. Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill, is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

CHAPTER XLVIII.

Negotiation of Bills.

SECTION 296.

NEGOTIATION OF BILL.

[31.] 1. A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

2. A bill payable to bearer is negotiated by delivery.

3. A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

4. Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferror had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferror.

5. Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

SECTION 297.

REQUISITES OF A VALID INDORSEMENT.

[32.] An indorsement in order to operate as a negotiation must comply with the following conditions, namely,—

1. It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a “copy” of a bill issued or negotiated in a country where “copies” are recognized, is deemed to be written on the bill itself.

2. It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

3. Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

4. Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described adding, if he thinks fit, his proper signature.

5. Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

6. An indorsement may be made in blank or special. It may also contain terms making it restrictive.

SECTION 298.

CONDITIONAL INDORSEMENT.

[33.] Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

SECTION 299.

INDORSEMENT IN BLANK AND SPECIAL INDORSEMENT.

[34.] 1. An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

2. A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

3. The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

4. When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

SECTION 300.

RESTRICTIVE INDORSEMENT.

[35.] 1. An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection."

2. A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

3. Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

SECTION 301.

NEGOTIATION OF OVERDUE OR DISHONORED BILL.

[36.] 1. Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

2. Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

3. A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when

it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

4. Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

5. Where a bill which is not overdue has been dishonored any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor, but nothing in this sub-section shall affect the rights of a holder in due course.

SECTION 302.

NEGOTIATION OF BILL TO PARTY ALREADY LIABLE THEREON.

[37.] Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

SECTION 303.

RIGHTS OF THE HOLDER.

[38.] The rights and powers of the holder of a bill are as follows:

1. He may sue on the bill in his own name:

2. Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

3. Where his title is defective (*a*) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (*b*) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

CHAPTER XLIX.

General Duties of the Holder.

SECTION 304.

WHEN PRESENTMENT FOR ACCEPTANCE IS NECESSARY.

1. Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

2. Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

3. In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

4. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

SECTION 305.

TIME FOR PRESENTING BILL PAYABLE AFTER SIGHT.

[40.] 1. Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

2. If he do not do so, the drawer and all indorsers prior to that holder are discharged.

3. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

SECTION 306.

RULES AS TO PRESENTMENT FOR ACCEPTANCE AND EXCUSES FOR NON-PRESENTMENT.

[41.] 1. A bill is duly presented for acceptance which is presented in accordance with the following rules:

- (a) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue;
- (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only;
- (c) Where the drawee is dead, presentment may be made to his personal representative;
- (d) Where the drawee is bankrupt, presentment may be made to him or his trustee;
- (e) Where authorized by agreement or usage, a presentment through the post-office is sufficient.

2. Presentment in accordance with these rules is excused, and a bill may be treated as dishonored by non-acceptance:

- (a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill;
- (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected;
- (c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

3. The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment.

SECTION 307.

NON-ACCEPTANCE.

[42.] 1. When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonored by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

SECTION 308.

DISHONOR BY NON-ACCEPTANCE AND ITS CONSEQUENCES.

[43.] 1. A bill is dishonored by non-acceptance:

- (a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
- (b) When presentment for acceptance is excused and the bill is not accepted.

2. Subject to the provisions of this Act, when a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

SECTION 309.

DUTIES AS TO QUALIFIED ACCEPTANCES.

[44.] 1. The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance.

2. Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not

subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

3. When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

SECTION 310.

RULES AS TO PRESENTMENT FOR PAYMENT.

[45.] Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented the drawer and endorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:

1. Where the bill is not payable on demand, presentment must be made on the day it falls due.

2. Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

3. Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

4. A bill is presented at the proper place:—

(a) Where a place of payment is specified in the bill and the bill is there presented;

- (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;
- (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known;
- (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

5. Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

6. Where a bill is drawn upon, or accepted by, two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

7. Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

8. Where authorized by agreement or usage a presentment through the post-office is sufficient.

SECTION 311.

EXCUSES FOR DELAY OR NON-PRESENTMENT FOR PAYMENT.

[46.] 1. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

2. Presentment for payment is dispensed with,—

- (a) Where, after the exercise of reasonable diligence, presentments as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment.

- (*b*) Where the drawee is a fictitious person;
- (*c*) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;
- (*d*) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented;
- (*e*) By waiver of presentment, express or implied.

SECTION 312.

DISHONOR BY NON-PAYMENT.

[47.] 1. A bill is dishonored by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid.

2. Subject to the provisions of this Act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

SECTION 313.

NOTICE OF DISHONOR AND EFFECT OF NON-NOTICE.

[48.] Subject to the provisions of this Act, when a bill has been dishonored by non-acceptance or by non-payment notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

Provided that—

1. Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due

course subsequent to the omission, shall not be prejudiced by the omission.

2. Where a bill is dishonored by non-acceptance, and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment unless the bill shall in the meantime have been accepted.

SECTION 314.

RULES AS TO NOTICE OF DISHONOR.

[49.] Notice of dishonor in order to be valid and effectual must be given in accordance with the following rules:—

1. The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

2. Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

3. Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

4. Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

5. The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonored by non-acceptance or non-payment.

6. The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor.

7. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A mis-description of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

8. Where notice of dishonor is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

9. Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

10. Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

11. Where there are two or more drawers or indorsers who are not partners notice must be given to each of them, unless one of them has authority to receive such notice for the others.

12. The notice may be given as soon as the bill is dishonored, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonor of the bill;

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

13. Where a bill when dishonored is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

14. Where a party to a bill receives due notice of dishonor, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonor.

15. Where a notice of dishonor is duly addressed and posted, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post-office.

SECTION 315.

EXCUSES FOR NON-NOTICE AND DELAY.

[50.] 1. Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

2. Notice of dishonor is dispensed with—

- (a) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged;
- (b) By waiver, express or implied. Notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice;
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment;
- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

SECTION 316.

NOTING OR PROTEST OF BILL.

[51.] 1. Where an inland bill has been dishonored it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

2. Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishonored by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor is unnecessary.

3. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

4. Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

5. Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

6. A bill must be protested at the place where it is dishonored:

Provided that—

(a) When a bill is presented through the post-office, and returned by post dishonored, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day;

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

7. A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

- (a) The person at whose request the bill is protested;
- (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

8. Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

9. Protest is dispensed with by any circumstance which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

SECTION 317.

DUTIES OF HOLDER AS REGARDS DRAWEE OR ACCEPTOR.

[52.] 1. When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

2. When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

3. In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonor should be given to him.

4. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

CHAPTER L.
Liabilities of Parties.

SECTION 318.

FUNDS IN HANDS OF DRAWEE.

[53.] 1. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

2. In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time when the bill is presented to the drawee.

SECTION 319.

LIABILITY OF ACCEPTOR.

[54.] The acceptor of a bill, by accepting it:

1. Engages that he will pay it according to the tenor of his acceptance;
2. Is precluded from denying to a holder in due course:
 - (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;
 - (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;
 - (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

SECTION 320.

LIABILITY OF DRAWER OR INDORSER.

- [55.] 1. The drawer of a bill by drawing it:
- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;
 - (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.
2. The indorser of a bill by indorsing it:
- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;
 - (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
 - (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.
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SECTION 321.

STRANGER SIGNING BILL LIABLE AS INDORSER.

[56.] Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

SECTION 322.

MEASURE OF DAMAGES AGAINST PARTIES TO DISHONORED BILL.

[57.] Where a bill is dishonored, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

1. The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser:

- (a) The amount of the bill;
- (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;
- (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

2. In the case of a bill which has been dishonored abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

3. Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

SECTION 323.**TRANSFERRER BY DELIVERY AND TRANSFERREE.**

[58.] 1. Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferrer by delivery."

2. A transferrer by delivery is not liable on the instrument.

3. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

CHAPTER LI.

Discharge of Bill.

SECTION 324.

PAYMENT IN DUE COURSE.

[59.] 1. A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

2. Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill:

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

3. Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

SECTION 325.

BANKER PAYING DEMAND DRAFT WHEREON INDORSEMENT IS FORGED.

[60.] Where a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays

the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

SECTION 326.

ACCEPTOR THE HOLDER AT MATURITY.

[61.] When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

SECTION 327.

EXPRESS WAIVER.

[62.] 1. When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

2. The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

SECTION 328.

CANCELLATION.

[63.] 1. Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

2. In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would

have had a right of recourse against the party whose signature is cancelled, is also discharged.

3. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

SECTION 329.

ALTERATION OF BILL.

[64.] 1. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hand of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

2. In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

CHAPTER LII.

Acceptance and Payment for Honor.

SECTION 330.

ACCEPTANCE FOR HONOR SUPRA PROTEST.

[65.] 1. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

2. A bill may be accepted for honor for part only of the sum for which it is drawn.

3. An acceptance for honor *supra* protest in order to be valid must—

(a) Be written on the bill, and indicate that it is an acceptance for honor:

(b) Be signed by the acceptor for honor.

4. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

5. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honor.

SECTION 331.

LIABILITY OF ACCEPTOR FOR HONOR.

[66.] 1. The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the

drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

2. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

SECTION 332.

PRESENTMENT TO ACCEPTOR FOR HONOR.

[67.] 1. Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor, or referee in case of need.

2. Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

3. Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

4. When a bill of exchange is dishonored by the acceptor for honor it must be protested for non-payment by him.

SECTION 333.

PAYMENT FOR HONOR SUPRA PROTEST.

[68.] 1. Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

2. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

3. Payment for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor which may be appended to the protest or form an extension of it.

4. The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.

5. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honor he pays, and all parties liable to that party.

6. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up, he shall be liable to the payer for honor in damages.

7. Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment.

CHAPTER LIII.

Lost Instruments.

SECTION 334.

HOLDER'S RIGHT TO DUPLICATE OF LOST BILL.

[69.] Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

SECTION 335.

ACTION ON LOST BILL.

[70.] In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

CHAPTER LIV.

Bill in a Set.

SECTION 336.

RULES AS TO SETS.

[71.] 1. Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

2. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

3. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

4. The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted part gets into the hands of different holder in due course, he is liable on every such part as if it were a separate bill.

5. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

6. Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

CHAPTER LV.

Conflict of Laws.

SECTION 337.

RULES WHERE LAWS CONFLICT.

[72.] Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

1. The validity of a bill as regards requisities in form is determined by the law of the place of issue, and the validity as regards requisities in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisities in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

2. Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

3. The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored.

4. Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

5. Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

CHAPTER LVI.

Cheques on a Banker.

SECTION 338.

CHEQUE DEFINED.

[73.] A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

SECTION 339.

PRESENTMENT OF CHEQUE FOR PAYMENT.

[74.] Subject to the provisions of this Act:—

1. Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

2. In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

3. The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

SECTION 340.

REVOCATION OF BANKER'S AUTHORITY.

[75.] The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by:—

1. Countermand of payment;
2. Notice of customer's death.

CHAPTER LVII.

Crossed Cheques.

SECTION 341.

GENERAL AND SPECIAL CROSSINGS DEFINED.

[76.] 1. Where a cheque bears across its face an addition of—(a) the words “and company” or any abbreviation thereof between two parallel transverse lines, either with or without the words “not negotiable;” or (b) two parallel transverse lines simply, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed generally.

(2). Where a cheque bears across its face an addition of the name of a banker, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

SECTION 342.

CROSSING BY DRAWER OR AFTER ISSUE.

[77.] 1. A cheque may be crossed generally or specially by the drawer.

2. Where a cheque is uncrossed, the holder may cross it generally or specially.

3. Where a cheque is crossed generally the holder may cross it specially.

4. Where a cheque is crossed generally or specially, the holder may add the words “not negotiable.”

5. Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

6. Where an uncrossed cheque, or cheque crossed gen-
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erally, is sent to a banker for collection, he may cross it specially to himself.

SECTION 343.

CROSSING A MATERIAL PART OF CHEQUE.

[78.] A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

SECTION 344.

DUTIES OF BANKER AS TO CROSSED CHEQUES.

[79.] 1. Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

2. Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

SECTION 345.

PROTECTION TO BANKER WHERE CHEQUE IS CROSSED.

[80.] Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

SECTION 346.

EFFECT OF CROSSING ON HOLDER.

[81.] Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

SECTION 347.

PROTECTION TO COLLECTING BANKER.

[82.] Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

CHAPTER LVIII

Promissory Notes.

SECTION 348.

PROMISSORY NOTE DEFINED.

[83.] 1. A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

2. An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

3. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

4. A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

SECTION 349.

DELIVERY NECESSARY.

[84.] A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

SECTION 350.

JOINT AND SEVERAL NOTES.

[85.] 1. A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

2. Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

SECTION 351.

NOTE PAYABLE ON DEMAND.

[86.] 1. Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

2. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and the facts of the particular case.

3. Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with effects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

SECTION 352.

PRESENTMENT OF NOTE FOR PAYMENT.

[87.] 1. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

2. Presentment for payment is necessary in order to render the indorser of a note liable.

3. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

SECTION 353.

LIABILITY OF MAKER.

- [88.] The maker of a promissory note by making it—
1. Engages that he will pay it according to its tenor.
 2. Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.
-

SECTION 354.

APPLICATION OF PART II TO NOTES.

[89.] 1. Subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

2. In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

3. The following provisions as to bills do not apply to notes; namely, provisions relating to—

- (a) Presentment for acceptance;
- (b) Acceptance;
- (c) Acceptance *supra* protest;
- (d) Bills in a set.

4. Where a foreign note is dishonored, protest thereof is unnecessary.

CHAPTER LIX.

Supplementary.

SECTION 355.

GOOD FAITH.

[90.] A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

SECTION 356.

SIGNATURE.

[91.] 1. Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

2. In the case of a corporation, where by this Act any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

SECTION 357.

COMPUTATION OF TIME.

[92.] Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

“Non-business days” for the purposes of this Act mean—

(a) Sunday, Good Friday, Christmas Day;

(b) A bank holiday under the Bank Holidays Act, 1871, or acts amending it;

(c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

SECTION 358.

WHEN NOTING EQUIVALENT TO PROTEST.

[93.] For the purpose of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

SECTION 359.

PROTEST WHEN NOTARY NOT ACCESSIBLE.

[94.] Where a dishonored bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonor of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

SECTION 360.

DIVIDEND WARRANTS MAY BE CROSSED.

[95.] The provisions of this Act as to crossed checks shall apply to a warrant for payment of dividend.

SECTION 361.

REPEAL.

[96.] The enactments mentioned in the second schedule of this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

SECTION 362.

SAVINGS.

[97.] 1. The rules in bankruptcy relating to bills of exchange, promissory notes, and checks, shall continue to apply thereto notwithstanding anything in this Act contained.

2. The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes and checks.

3. Nothing in this Act or in any repeal effected thereby shall affect:

- (a) The provisions of the Stamp Act, 1870,¹ or acts amending it, or any law or enactment for the time being in force relating to the revenue;
- (b) The provisions of the Companies Act, 1862,² or acts amending it, or any act relating to joint stock banks or companies;
- (c) The provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively;
- (d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

¹ 33 and 34 Vict., c. 97.

² 25 and 26 Vict., c. 89.

SECTION 363.**SAVING OF SUMMARY DILIGENCE IN SCOTLAND.**

[98.] Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or effect the law and practice in Scotland in regard to summary diligence.

SECTION 364.**CONSTRUCTION WITH OTHER ACTS. ETC.**

[99.] Where any act or document refers to any enactment repealed by this Act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

SECTION 365.**PAROL EVIDENCE IN JUDICIAL PROCEEDINGS IN SCOTLAND.**

[100.] In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank check, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank check, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank check, or promissory note has undergone the sesennial prescription.

*First Schedule.*¹

Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, A. B. (householder), of.....
in the county of....., in the United Kingdom, at the
request of C. D., there being no notary public available, did
on the.....day of.....188..at.....demand
payment (or acceptance) of the bill of exchange hereunder
written, from E. F., to which demand he made answer (state
answer, if any.) Wherefore, I now in the presence of G. H.
and J. K. do protest the said bill of exchange.

(Signed)

A. B.

G. H. }
J. K. } Witnesses.

N. B.—The bill itself should be annexed, or a copy of
the bill and all that is written thereon should be underwritten.

¹The other schedules are purely local in interest, and are
therefore omitted.—ED.

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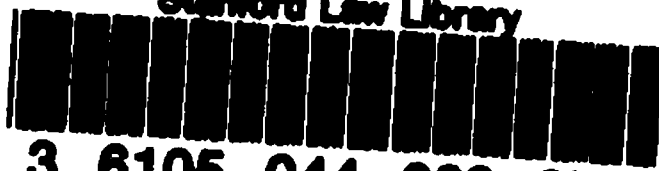
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